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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 230.

ANNIE KEALOHA AND KEONI WILLIAMS, APPELLANTS,

vs.

WILLIAM R. CASTLE, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED FEBRUARY 15, 1907.

(20,573.)

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INDEX.

	Original.	Print.
Proceedings in circuit court	1	1
Will of Joshua R. Williams	1	1
Petition	4	2
Summons	9	4
Demurrer to petition	10	5
Stipulation as to will of J. R. Williams	12	6
Judge's certificate	14	7
Opinion of supreme court	15	8
Judgment of circuit court	19	10
Petition for writ of error	20	11
Assignment of errors	21	11
Notice of issue of writ of error	23	13
Summons on application for writ of error	25	13
Opinion on application for writ of error	26	14
Judgment of supreme court	27	15
Affidavit of W. L. Castle	28	15
Bond on appeal	31	17
Assignment of errors	33	18
Appeal and allowance of same	36	19
Citation and service	37	19
Clerk's certificate	39	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1907.

1 *In the Name of God. Amen.*

I, *Joshua R. Williams*, of Halawa, Ewa, Island of Oahu, Hawaiian Islands, conscious of the uncertainty of life, but being of sound and disposing mind and memory, make and publish my last Will and Testament, as follows:

First. I give devise, and bequeath unto *William R. Castle*, of Honolulu, Island of Oahu, his heirs and assigns, all the Estate of which I shall die possessed, real and personal, of every kind and description upon the following trust, viz:

I desire and direct said trustee, upon my decease, to take possession of my entire estate, wherever situated, and to manage and invest the same in such manner as he may judge to be expedient, and at any time to sell any portion of my estate, real or personal without obtaining any order of Court, and to reinvest the same, and to retain entire control of said estate during the term of this trust. And to pay the income of said estate to my wife, *Kaaikaula Williams*, and to my children *Lydia*, the wife of W. Chapman, *John*, *Henry*, *Joshua*, *Josephine* and *Georgiana*, in equal shares, during the terms of their natural lives and the survivor of them. And upon the decease of any of my said children his or her share is to be paid to his or her children, if any, by said trustee, until the decease of the survivor of my said wife and children, when my estate shall be divided. And upon the decease of any of my said children without issue, their share of the income is to be divided by said trustee equally among the survivors and the issue of deceased children.

Second. I give and bequeath to my sons, *Edgar* and *Shirley* born in America, and probably residing in S. Glastonbury Conn the sum of Five Dollars each.

Third. I nominate and appoint said William R. Castle to be trustee and executor of this my Will.

2 *In witness whereof* I have hereunto set my hand and seal this twenty-fourth day of August, A. D. Eighteen Hundred and Seventy eight, hereby revoking all former Wills by me made.

(Signed) JOSHUA R. WILLIAMS

[SEAL]

Signed, sealed published and declared by the said Joshua R. Williams, as his last Will and Testament, in our presence who at his request, in his presence and in the presence of each other have subscribed our names as witnesses thereto.

(Signed) DAVID DAYTON
" ARTHUR W. RICHARDSON
" FRANCIS M. HATCH

3 *Codicil.*

I said Joshua R. Williams, do hereby revoke my will before written, as far as concerns my said daughter Lydia, the wife of W. Chapman, and I except her from the provisions of the same: and I

hereby give and bequeath to my said daughter Lydia Chapman, Ten Dollars in full of any share in my estate. And I hereby confirm my will as above written (except as my daughter Lydia) devising all my said Estate to said Trustee to pay the income to my wife, Kaaikaula and my children, John Williams, Henry Williams, Joshua Williams, Josephine Williams and Georgiana Williams in equal shares during their lives as aforesaid.

In Witness Whereof I have hereunto set my hand and seal this 19th day of April A. D. 1879.

(Signed) JOSHUA R. WILLIAMS. [SEAL.]

Signed, sealed, published and declared (the word "Revoke" being interlined in the second line) by said Joshua R. Williams, as and for a Codicil to his last Will, in our presence, who at his request in his presence and in the presence of each other, have set our names as witnesses thereto.

(Signed) J. MOTT SMITH.
" A. W. RICHARDSON.
" FRANCIS M. HATCH.

4 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ANNIE KEALOHA and KEONI WILLIAMS, Petitioners,
vs.
WILLIAM R. CASTLE, Trustee, Respondent.

$2 Stamps.

To the Hon. J. T. De Bolt, first judge of the first judicial circuit, Territory of Hawaii:

The undersigned, native Hawaiians and citizens of the Territory of Hawaii, respectfully represent to your Honor as follows:

I.

That William R. Castle, the respondent above named, is trustee of the estate of J. R. Williams, deceased, of Ewa, in the Island of Oahu, in said Territory, and that under the will of said J. R. Williams that he, the said trustee, was directed "to retain the entire control of said estate during the term of this trust," said term being the life of the survivor of all of his, said Williams' children, and upon the decease of the said survivor to divide the said property, share and share alike, between the heirs-at-law of said children *per stirpes*.

II.

Your petitioners further show that the children entitled to receive the benefits of said estate were Henry, John and Joshua Williams, sons, and Josephine and Georgiana Williams, daughters, of whom Henry and John are both dead leaving them surviving each a widow with children, and that the care of the estate and the distribution of

the income has been continuously kept up and carried on by the said respondent to the present time satisfactorily to all of those entitled to interests in said estate except as below set forth.

III.

Your petitioners further show that upon the death of said John Williams he left him surviving a widow, Kahalauaola and three children; the first, Othello by name, was son of said John's first wife Kahinu; that during the life of said Kahinu, and while she was living in lawful wedlock with her said husband, John Williams, said Kahalauaola, being then unmarried, bore two children by said John Williams, the eldest Annie, was born in 1879, and the second, Keoni, was born in 1883. That some years thereafter said John Williams' wife Kahinu died and he thereafter intermarried with said Kahalauaola and thereupon admitted that he was the father of the said two children above named.

IV.

That in the year 1891, the said respondent being uncertain as to the propriety of paying over to the said children, or to anyone in their behalf, their share or any portion of the income of the estate of said J. R. Williams, deceased, applied to the Supreme Court in Probate, said Court at that time having jurisdiction at Chambers in matters of probate, for instructions as to the standing of said children, and that he was instructed and authorized by the Honorable Richard F. Bickerton, one of the Justices of said Court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents, and that thereafter said respondent as trustee duly made such payments to said Kahalauaola, the mother of said children, in their behalf, until within a year or two past, since which time respondent has utterly refused to make payments to the said children, or either of them, or to anyone in their behalf, claiming that they were not and are not now entitled to receive any portion of the income or to share in the principal of the said estate of J. R. Williams, deceased.

6 V.

Petitioners further show that said petitioner Annie is now married to one Kumano Kealoha and for several years has been of full legal age, that the second of said children, Keoni, arrived at legal majority in the year 1903, and that both of said children of said John Williams are entitled to receive their share of the income and profits of the said estate of J. R. Williams.

VI.

Petitioners further show that respondent as said trustee, has from time to time received large amounts of income of the said estate of J. R. Williams, and that they ought of right have received a considerable portion of such income, but that respondent has refused to pay them any portion thereof or to make any account to them of his receipts and income, which they claim is a denial of right to them.

Wherefore, said petitioners pray that said respondent may be ordered to render to them an account of said receipts, expenses and disbursements in connection with his said trust for the two years last past, and to indicate the amount which may be due to these petitioners, and if upon such accounting it should appear that any further or other sums are due these petitioners out of the said estate, then and in such case that he, the respondent be ordered and directed to make payment to them of such portion of said income of the estate.

And your petitioners will ever pray &c.

Dated, Honolulu, T. H. 30th June A. D. 1905.

(Sg.) ANNIE KEALOHA.
(Sg.) JOHN WILLIAMS.

(S'g) T. M. HARRISON.
Solicitor for the Petitioners.

7 First Judicial Circuit.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Annie Kealoha being duly sworn deposes and says:

That the foregoing petition has been read, translated and explained to her, that she understands the same and that the contents thereof are true to the best of her knowledge and belief.

(Sg.) ANNIE KEALOHA.

Subscribed and sworn to before me this 30th day of June A. D. 1905.

(Sg.) P. H. BURNETTE,
Notary Public, First Circuit, Territory of Hawaii.

[SEAL.]

8 [Endorsed:] E. No. 1473. Circuit Court, First Circuit, Territory of Hawaii, at Chambers. Kealoha & Williams *vs.* W. R. Castle, trustee. Petition. Rec'd $37.00. Filed June 30, 1905, 11 o'clock a. m. (Sg.) M. T. Simonton, clerk. T. M. Harrison, Attorneys for Petitioners.

9 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers.

ANNIE KEALOHA and KEONI WILLIAMS, Petitioners,
v.
WILLIAM R. CASTLE, Trustee, Respondent.

Chambers Summons.

THE TERRITORY OF HAWAII:

To the high sheriff of the Territory of Hawaii or his deputy; the sheriff of the county of Oahu or his deputy:

You are commanded to summon William R. Castle, Trustee, to appear ten days after service hereof, if he resides on the Island of

Oahu otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court Room at Honolulu, Island of Oahu, to answer the annexed petition of Annie Kealoha and Keoni Williams, petitioners.

And you are further commanded, by order of the Honorable Judge of the Circuit Court of the — Circuit —. And have you then there this writ with full return of your proceedings thereon.

Witness the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit, at Honolulu, Oahu, this thirtieth day of June, 1906.

[SEAL.] (Sg.) M. T. SIMONTON, *Clerk.*

Section 1769 Revised Laws. The time within which an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

[Endorsed:] E. 1473. Circuit Court, First Circuit. Annie Kealoha and Keoni Williams *v.* William R. Castle, Trustee. Chambers Summons. Issued at 11.05 o'clock A. M., June 30, 1905. (Sg.) M. T. Simonton, Clerk. Returned at 10.10 o'clock A. M., July 5, 1905. (Sg.) J. A. Thompson, Clerk.

Served the within Summons as follows:

On W. R. Castle, Trustee, Honolulu, Oahu, this 30th day of June, 1905, by delivering to him a certified copy hereof and of the petition annexed hereto, and at the same time showing him the original as directed.

Dated Honolulu, June 30th, 1905.

(Sg.) J. S. KALAKIELA,
Deputy Sheriff.

10 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ANNIE KEALOHA and KEONI WILLIAMS, Petitioners,
vs.
WILLIAM R. CASTLE, Trustee, Respondent.

The Demurrer of William R. Castle, Respondent, to the Petition of Annie Kealoha and Keoni Williams, Petitioners.

This respondent, doth demur to said petition and for cause of demurrer showeth:—

1. That the said petitioners have not in and by their said petition made or stated any such cause as doth or ought to entitle*d* them, or either of them, to any such discovery or relief as is thereby sought and prayed for from or against this respondent.

2. That the said petitioners have not shown by their said petition that they, or either of them, have any right or interest in the said

estate therein described, which would entitled them, or either of them, to the relief thereby prayed.

Wherefore, and for divers other good causes of demurrer appearing in the said petition, this respondent demurs thereto and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said petition; and prays to be hence dismissed and discharged.

Dated Honolulu, T. H., 1st July, 1905.

WILLIAM R. CASTLE.

(Sg.) By his Attorneys, CASTLE & WITHINGTON.

I hereby certify that the foregoing demurrer is well founded in point of law, and is not intended for delay.

(Sg.) DAVID L. WITHINGTON,
Attorney for the Respondents.

11 [Endorsed:] E. No. 1473. Circuit Court, First Circuit, Territory of Hawaii, at Chambers. Annie Kealoha and Keoni Williams *vs.* W. R. Castle, trustee. Demurrer. Filed July 1, 1905. (Sg.) Henry Smith, clerk. Castle & Withington, attorneys for respondent.

12 In the Supreme Court of the Territory of Hawaii. In Equity.

ANNIE KEALOHA and KEONI WILLIAMS, Petitioners,
vs.
WILLIAM R. CASTLE, Respondent.

Stipulation.

It is hereby stipulated and agreed between the parties to this action, that a copy of the last will and testament of J. R. Williams the person mentioned in the original complaint herein filed in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in Equity, at Chambers, the said will having been admitted to probate by the Supreme Court, Hawaiian Islands, Island of Oahu, the 30th July 1879, may be attached to the said complaint and made a part thereof, and received and considered in this action, both in this Court and all other Courts in which proceedings have been, or may be, taken therein, as though it had been a part of said complaint when it was first filed in said Circuit Court.

Dated, Honolulu, T. H. 11th September 1905.

(Sg.) T. M. HARRISON,
Attorney for the Petitioners.

(Sg.) A. G. M. ROBERTSON,
Attorney for the Respondent.

13 [Endorsed:] Supreme Court, Territory of Hawaii. Annie Kealoha and Keoni Williams *vs.* William R. Castle, trustee. Stipulation. Filed Sept. 11, 1905. (Sg.) George Lucas, clerk. T. M. Harrison, attorneys for petitioners.

14 In the Circuit Court of the First Circuit, Territory of Hawaii,
At Chambers. In Equity.

Bill for an Accounting.

ANNIE KEALOHA and KEONI WILLIAMS, Petitioners,
vs.
WILLIAM R. CASTLE, Trustee, Respondent.

Questions of Law Reserved for the Consideration of the Supreme Court.

This suit in equity is pending before me at Chambers as First Judge of the said Circuit Court of the First Circuit upon Petitioners' bill and Respondent's demurrer thereto; and being regularly before me the undersigned, First Judge of the Circuit Court of the First Circuit for hearing and disposal. And a question of law having arisen, upon which I am in doubt, namely: Whether or not said demurrer should be sustained or overruled, which involves the construction of Section 2288, Revised Laws of Hawaii, and its application to the facts as alleged in the bill herein; that is to say, were the petitioners made legitimate by the marriage of their parents subsequent to their birth and there rendered capable of inheriting from their father, J. R. Williams, deceased.

I do therefore hereby in accordance with section 1862 of the Revised Laws, reserve and submit for consideration of the Honorable Supreme Court, of the Territory of Hawaii, the following question of law, namely: Whether or not said demurrer shall be sustained or overruled: And,

I hereby certify that the foregoing statement, records and papers on file herein attached hereto constitute a complete and accurate report necessary to a full understanding of the said question by the said Honorable Supreme Court:

Dated, at Honolulu, Island of Oahu, Territory of Hawaii this tenth day of July A. D. 1905.

(Sg.) J. T DE BOLT,
First Judge of the Circuit Court of the First Circuit, Territory of Hawaii.

Endorsed: Filed July 10, 1905, at 1.15 o'clock P. M. (Sg.) P. D. Kellett, Clerk.

15 In the Supreme Court of the Territory of Hawaii.

October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS
v.
WILLIAM R. CASTLE, Trustee.

Question Reserved from Circuit Judge of the First Circuit.

Argued October 3, 1905; decided October 16, 1905.

FREAR, C. J., HARTWELL and WILDER, JJ.

CHILDREN OF AN ADULTEROUS INTERCOURSE NOT LEGITIMATIZED BY PARENTS' SUBSEQUENT MARRIAGE—*following 4 Haw. 292.*—The plaintiffs being illegitimate children of persons living in adultery who afterwards married, claimed that they were thereby made legitimate under the act providing that "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock." Sec. 2288, R. L.; also claiming that the decision was wrong, 4 Haw. 292, which held that the act did not include children of an adulterous intercourse; also that an instruction given to the trustee by a justice of this Court in 1891 to pay the income to the mother of the children for them on the theory that they had become legitimate by the subsequent intermarriage of their parents, was *res judicata* upon the Trustee through the entire administration of the trust. *Held:* The court is not prepared to hold the decision in 4 Haw. 292, to be wrong and does not see fit to disregard it as a precedent; or to say that if the question were presented *de novo* it would take any other view; and as to the instruction to the Trustee, there does not appear to have been any
16 contest or issue concerning the legitimacy of the children.

Opinion of the Court by Hartwell, J.

The plaintiffs brought a bill in equity in order to compel the respondent as trustee under the will of Joshua R. Williams to pay to them such share of the income of the testastor's estate as by the terms of the testator's will would be payable to the children of a deceased child of the testator.

The plaintiffs are illegitimate children of a son of the testator born while their father was living in lawful wedlock with his wife, but after the death of the wife their father and mother intermarried and thereby, as the plaintiffs claim, they were made legitimate under the provisions of the statute that "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock." (Sec. 2288 Revised Laws.)

The bill also avers that in the year 1891 the respondent "applied to the Supreme Court in Probate, said court at that time having jurisdiction at Chambers in matters of probate, for instructions as to the standing of said children, and that he was authorized and instructed by the Honorable Richard F. Bickerton, one of the Justices of said court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents, and that thereafter said respondent as trustee duly made such payments to said Kahalauaola, the mother of said children, in their behalf, until within a year or two past, since which time respondent has utterly refused to make any payments to the said children, or either of them, or to anyone in their behalf, claiming that they were not and are not now entitled to receive any portion of the income or to share in the principal of the said estate *to* J. R. Williams, deceased."

The defendent having demurred to the bill and the Circuit
17 Judge being in doubt whether the demurrer should be sustained or overruled, in respect of the construction of the statute referred to and its application to the facts alleged in the bill, reserved for the consideration of this Court the question whether the demurrer should be sustained or not; that is to say, were the petitioners made legitimate by the marriage of their parents subsequent to their birth and thereby rendered capable of inheriting from their father, J. R. Williams, deceased.

The statute in question was held in *Kekula and Husband versus Piocina and Paku*, 4th Hawaiian 292 (1880), to be inapplicable to offspring of an adulterous intercourse, the court saying that "any other construction of this Act would be subversive of good morals and we cannot think that the legislature so intended it."

The plaintiffs do not deny that the decision applies to their case, but they claim that it is bad law and ought not to be treated as a precedent, and moreover that the instruction given to the testator by Justice Bickerton makes the matter *res judicata* during the entire administration of the trust estate.

We are not prepared to hold that the Kekula decision was wrong. Under the Constitution and laws in force at the time of that decision the court had power to declare a statute unconstitutional which it deemed to be *contra bonos mores*.

An instance of the exercise of this power is *Kinimaka v. Ah Fai*, 3 Haw. 631, in which the court held that a statute is unconstitutional and void as contrary to public policy and morality which enacts that: "No marriage of a Hawaiian woman with a Chinaman shall be invalid by reason of a previous marriage of such Chinaman in China; provided that such marriage shall have been unknown to such Hawaiian woman at the time of her marriage." In the exercise of its discretionary power the court in the Kekula case could properly have held that the Act as applied to the facts of that case was unconstitutional because in such application the act would be immoral, or the same conclusion could be reached, and in fact was

reached, by considering that the legislature did not intend
18 such application by the Act. Whether we should take the same view as was taken by the court in that case or not, the decision is a precedent which we do not see fit to disregard. Nor are we prepared to say that if the question were now presented *de novo* we should take any other view of the matter than was taken in that case.

The decision laid down a rule affecting rights of property and it is impossible to say how far it may have affected property rights since acquired.

As to the instruction by Mr. Justice Bickerton, it does not appear that any notice was given of the proceedings or that there was any contest or issue made concerning the legitimacy of children.

The Circuit Judge is advised that the demurrer ought to be sustained.

T. M. Harrison for plaintiffs.
A. G. M. Robertson for respondent.

(Sg.) ALFRED S. HARTWELL.
(Sg.) A. A. WILDER.

FREAR, *C. J.:*

I concur on the ground that, although I think the decision in the *Kekula* case erroneous, we ought not to overrule it under all the circumstances.

(Sg.) W. F. FREAR.

19 In the Circuit Court of the First Circuit, Territory of Hawaii,
At Chambers. In Equity.

ANNIE KEALOHA and KEONI WILLIAMS
vs.
WILLIAM R. CASTLE, Trustee.

Decree.

The above entitled cause having come on for hearing on the petition of the plaintiffs herein and the demurrer thereto of the respondent herein, and the question as to whether the said demurrer should be sustained or overruled having been reserved for determination by the Supreme Court, by the Honorable J. T. De Bolt, First Judge in and of the above-entitled Court, before whom said cause was and is pending, and the Supreme Court having in and by its opinion rendered and filed of the 16th day of October, 1905, advised this Court to sustain said demurrer, and said cause having been remanded with instructions to sustain said demurrer, now therefore,

It is hereby ordered, adjudged and decreed that the respondent's demurrer herein to the plaintiffs' petition herein be, and the same is, hereby sutained, and said petition is hereby dismissed with costs.

Dated, Honolulu, October 19th, 1905.

(Sg.) J. T. DE BOLT,
First Judge of the Circuit Court of the First Circuit.

[Endorsed:] Circuit Court, First Circuit. In Equity. Annie Kealoha and Keoni Williams *vs.* William R. Castle. Decree. Filed Oct. 19, 1905. (Sg.) George Lucas, clerk.

20 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS, Plaintiffs in Error,
vs.
WILLIAM R. CASTLE, Trustee, Defendant in Error.

Stamps, $2.00 / 100.

Petition for Writ of Error & Assignment of Errors.

To the Honorable W. F. Frear, chief justice of the supreme court of the Territory of Hawaii:

Now come Annie Kealoha and Keoni Williams, Plaintiffs-in-error in the above entitled cause, and complain:—

That the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, in Equity, at Chambers, at Honolulu on the 19th day of October 1905, in a certain cause entitled: Annie Kealoha and Keoni Williams, Petitioners *versus* Willliam R. Castle, Trustee, Respondent, wherein the above named Plaintiffs-in-error were petitioners and the above named defendant-in-error was respondent, made a decree sustaining the demurrer of the respondent to the petition of the petitioners and dismissing said petition.

That no appeal was taken and perfected from said decree.

That six months have not yet expired since said decree was made.

That no execution upon said decree has issued and been fully satisfied.

And the Plaintiffs-in-error allege and say in the record of the proceedings in the said cause before said First Judge, there is manifest error in this, to wit:—

21 1. That it was error to render and enter said decree sustaining the said demurrer of the said respondent and defendant-in-error.

2. That the plaintiffs-in-error having been born while their father was living in lawful wedlock with a wife other than the mother of said plaintiffs-in-error, it was error to hold that the plaintiffs-in-error were not made legitimate children of their father and mother by the marriage of their father and mother after the death of the said wife of their father, who was living at the time plaintiffs-in-error were born, by virtue of section 2288 of the Revised Laws of Hawaii, which reads: "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock."

3. That it was error to hold that the instruction given to the defendant-in-error in 1891 by Mr. Justice Bickerton of the Supreme Court of the Hawaiian Islands, to make payment of a portion of the

income of the trust property, the title to which is in dispute in this suit, to the plaintiffs-in-error on the theory that they had become legitimate by the subsequent intermarriage of their parents, did not make the matters in question in this suit *res judicata* during the entire administration of the said trust property.

4. That it was error to follow the decision in Kekula and Husband *versus* Piociwa and Paku, 4 Hawaiian Reports 292 (1880) as a precedent, and to hold that Revised Laws of Hawaii, section 2288, above quoted, is unconstitutional because *contra bonos mores.*

Wherefore, the said plaintiffs-in-error, Annie Kealoha and Keoni Williams, pray for the allowance of a Writ of Error and such orders and process as may cause the said decree of the said First Judge to be corrected and reversed, and the said First Judge to be
22 directed and ordered to enter a decree overruling the respondent's demurrer to the petition in the said suit.

And the said plaintiffs-in-error do not pray that said Writ of Error may issue for any defect of form merely in any declaration, nor for any matter held for the benefit of the said plaintiffs-in-error.

Dated, Honolulu, T. H., 10th February, 1906.

ANNIE KEALOHA &
KEONI WILLIAMS,
By their attorney, (Sg.) T. M. HARRISON,
Attorney for the Plaintiffs in Error.

(Sg.) SMITH & LEWIS,
Of Counsel for Pl'ff in Error.

TERRITORY OF HAWAII, *County of Oahu, ss:*

First Judicial Circuit.

T. M. Harrison, having been duly sworn, deposes and says: —

That he is attorney for Annie Kealoha and Keoni Williams, the petitioners and plaintiffs-in-error in the above entitled suit, and makes this affidavit on their behalf.

That he has read the foregoing petition and assignment of errors and knows the contents thereof, and that the same are true.

(Sg.) T. M. HARRISON.

Subscribed and sworn to this 10th day of January 1906, before me.

(Sg.) J. A. THOMPSON,
Clerk, First Circuit, Territory of Hawaii.

23 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS, Plaintiffs in Error,
vs.
WILLIAM R. CASTLE, Trustee, Defendant in Error.

Notice.

Take notice that a writ of error has issued in the above entitled matter this 10th day of February A. D. 1906.

(Sg.) T. M. HARRISON.
(Sg.) SMITH & LEWIS,
Attorney-for Plaintiffs in Error.

To William R. Castle, Trustee.

24 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Annie Kealoha & Keoni Williams *vs.* William R. Castle, trustee. Petition for writ of error assignment of errors & notice. Rec'd $25.00/100. Filed February 10, 1906 at 11.35 a. m. (Sg.) J. A. Thompson, Clerk. Smith & Lewis, T. M. Harrison, attorneys for plaintiffs-in-error.

25 In the Supreme Court of the Territory of Hawaii.

ANNIE KEALOHA & KEONI WILLIAMS, Plaintiffs in Error,
v.
WILLIAM R. CASTLE, Trustee, Defendant in Error.

Stamps $2.00/100.

Summons.

The Territory of Hawaii to the high sheriff of the Territory of Hawaii or his deputy, the sheriff of the county of Oahu, or his deputy:

You are commanded to summon William R. Castle, Trustee, of Honolulu, County of Oahu, and Territory of Hawaii to appear at the coming session of this Honorable Court to be held at the Court Room of said Court in the Judiciary Building in Honolulu, aforesaid on Monday the 5th day of March 1906 at ten o'clock a. m. to answer the annexed petition for writ of error, assignment of errors and notice of said writ and to make service upon the said William R. Castle, trustee of said petition for writ of error, assignment of errors and notice. And have you then there this Writ with full return of your doings thereon.

Witness the Honorable Chief Justice of the Supreme
[SEAL.] Court of the Territory of Hawaii, at Honolulu, County of Oahu, this 10th day of January, 1906.

(Sg.) J. A. THOMPSON, *Clerk.*

[Endorsed:] Supreme Court, Territory of Hawaii. Annie Kealoha & Keoni Williams *v.* William R. Castle, trustee. Summons. Issued at 11.45 o'clock a. m., February 10, 1906. (Sg.) J. A. Thompson, Clerk. Returned at 11 o'clock a. m., February 12, 1906. (Sg.) J. A. Thompson, Clerk.

Return of Service.

Served the within Summons as follows:
On William R. Castle, Trustee at Honolulu this 10th day of February 1906, by delivering to him a certified copy hereof and of the petition or complaint annexed hereto and at the same time showing him the original. Also served on him a certified copy of the petition for Writ of Error, Assignment of Errors and Notice as directed.

(Sg) J. S. KALAKIELA,
Dep. Sheriff.

Dated Honolulu Feb'y 10th, 1906.

26 In the Supreme Court of the Terrttory of Hawaii, October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS
vs.
WILLIAM R. CASTLE, Trustee.

Error to the Circuit Judge of the First Circuit.

Submitted March 12, 1906; Decided March 15, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Decision on this, ante p. 45, affirmed on error.

Opinion of the Court by Hartwell, J.

All the matters presented in the assignment of errors were passed upon by this Court, ante p. 45, on the question reserved by the Circuit Judge, whether the defendant's demurrer should be sustained. The Circuit Judge having been advised by us that the demurrer ought to be sustained a decree was made by him accordingly, to which the plaintiffs bring this Writ of Error in order to obtain the final judgment of this Court, which is that the decree is affirmed.
Smith & Lewis and T. M. Harrison for Plaintiffs-in-error.
Castle & Withington and A. G. M. Robertson for Defendant-in-error.

(Sg.) W. F. FREAR.
(Sg.) ALFRED S. HARTWELL.
(Sg.) A. A. WILDER.

Endorsed: Filed March 15, 1906. (Sg.) George Lucas, Clerk.

27 In the Supreme Court of the Territory of Hawaii.

October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS, Plaintiffs in Error,
vs.
WILLIAM R. CASTLE, Trustee, Defendant in Error.

Judgment.

Error to the First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii:

This cause came on to be heard on the transcript of the record from the First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said First Judge, in this cause, sustaining the demurrer of the respondent and defendant-in-error to the petition of the petitioners and plaintiffs-in-error and dismissing the said petition be, and the same is hereby affirmed.

Dated, Honolulu, T. H. 27th April 1906.

(Sg.) GEORGE LUCAS, *Clerk.*

[Endorsed:] Judgment. Filed April 27, 1906. (Sg.) George Lucas, clerk.

28 In the Supreme Court of the Territory of Hawaii.

October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS
vs.
WILLIAM R. CASTLE, Trustee.

Affidavit of W. L. Castle.

W. L. Castle, having been duly sworn, on oath deposes and says:

1. That he is cashier and bookkeeper for William R. Castle, trustee of the estate of Joshua R. Williams according to the terms of his will and the codicil thereto a copy of which is annexed to the petition in the above entitled suit; and that he is personally acquainted with the amount and value of the said estate now in the possession and control of the said William R. Castle, as trustee, as aforesaid.

2. That of the beneficiaries under the said will and codicil, namely, Kaaikaula Williams, the widow of the said Joshua R. Williams, and John, Henry, Joshua, Josephine and Georgiana, children of said Joshua R. Williams, the said Kaaikaula Williams and the said John and Henry are dead, but the said Joshua, Josephine and Georgiana still live.

3. That the said estate of Joshua R. Williams in the possession and control of the said William R. Castle as trustee, as aforesaid, on the 27th day of April 1906, consisted of $16,300 fully secured by mortgages, $2508.80 cash, 4570 square feet of land on Maunakea Street in the City of Honolulu assessed at last assessment in January 1906 by the tax assessor for the Territory of Hawaii as of the value of $4000, lot 8 on Fort Street in said Honolulu having an area of 9478 square feet and assessed at last assessment in January 1906 by the said tax assessor, with the improvements thereon, as of the value of $3550 and a small piece of cane land rented to the Hono-
29 lulu Plantation Company for $15 per annum of the value of about $150, in all property of a value amounting to $26,508.80.

4. That the legitimate children of the said John son of the said Joshua R. Williams, if any there be, are, and were on 27th April 1906, entitled, according to the will and codicil of the said Joshua R. Williams, to one fifth of the property valued, as aforesaid, at $26,508.80, that is to property of the value of $5301.76; and that over and above the said property of the value of $5301.76, there was in the possession of the said trustees on 26th April 1906, the sum of $1115.79 of accumulated income of said property of the value of $5301.76 to which the said children of John son of Joshua R. Williams were, and now are, entitled.

5. That Othello Williams, the person mentioned in the said petition, is dead; and that Annie Kealoha and Keoni Williams, the petitioners in this suit, claim thereby the said property of the value of $5301.76 and the said sum of $1115.79, making in all property of the value of $6417.55, which was in the possession of the said William R. Castle, as trustee, on the 27th day of April 1906; and that the said property of the value of $6417.55 was in controversy in this suit on the 27th day of April 1906, and the value or amount of property so in controversy now exceeds, and on the 27th day of April 1906 when the Judgment was rendered in this suit affirming the decree of the First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, sustaining the respondent's demurrer to the petition and dismissing the said petition, exceeded, the sum or value of $5000.

(Sg.) W. L. CASTLE.

Subscribed and sworn to this 28th day of April 1906, before me.

(Sg.) T. M. HARRISON,
[SEAL.] *Notary Public, First Circuit, Territory of Hawaii.*

30 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Annie Kealoha & Keoni Williams *vs.* William R. Castle, trustee. Affidavit of W. L. Castle. Filed June 7, 1906. (Sg.) Henry Smith, clerk. Smith & Lewis and T. M. Harrison, attorneys for appellants.

31 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS
vs.
WILLIAM R. CASTLE, Trustee.

Bond on Appeal.

Know all men by these presents: That we, Annie Kealoha, Keoni Williams, and James A. Low, all of the County of Oahu and Territory of Hawaii, are held and firmly bound unto the above named William R. Castle, Trustee, in the sum of two hundred and fifty dollars, to be paid to the said William R. Castle, Trustee, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 8th day of May 1906.

Whereas, the above named Annie Kealoha and Keoni Williams have prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the Supreme Court of the Territory of Hawaii.

Now, therefore, the condition of this obligation is such, that if the above named Annie Kealoha and Keoni Williams shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Sg.) ANNIE KEALOHA. [SEAL.]
(Sg.) KEONI WILLIAMS. [SEAL.]
(Sg.) JAMES A. LOW. [SEAL.]

Approved by:

(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

O. K.
(Sg.) C. & W.,
By D. L. WITHINGTON.

32 [Endorsed:] No. —. Supreme Court, Territory of Hawaii, Annie Kealoha & Keoni Williams *vs.* William R. Castle, trustee. Bond on appeal. Filed June 7, 1906. (Sg.) Henry Smith, clerk. Smith & Lewis and T. M. Harrison, attorneys for appellants.

33 In the Supreme Court of the United States.

ANNIE KEALOHA and KEONI WILLIAMS, Appellants,
vs.
WILLIAM R. CASTLE, Trustee, Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come Annie Kealoha and Keoni Williams, the appellants in the above entitled suit, and say that in the record of the proceedings in the said suit in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:—

1. That it was error to render judgment affirming the decree of the First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, made the 19th day of October 1905, sustaining the respondent's demurrer to the petition in this suit and dismissing the said petition.

2. That the appellants having been born while their father was living in lawful wedlock with a wife other than the appellant's mother, it was error to hold that the appellants were not made legitimate children of their father and mother by the marriage of their father and mother after the death of the wife of their father, who was living at the time of appellants birth, as aforesaid, by virtue of section 2288 of the Revised Laws of Hawaii, which reads: "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock."

3. That it was error to hold that the instruction given to the appellee in 1891 by Mr. Justice Bickerton of the Supreme Court
34 of the Hawaiian Islands, to make payment of a portion of the income of the trust property, the title to which is in dispute, in this suit, to the appellants on the theory that they had become legitimate by the subsequent intermarriage of their parents, did not make the matters in question *res judicata* during the entire administration of the said trust property.

4. That it was error to follow the decision in Kekula and Husband *versus* Piceiwa and Paku, 4 Hawaiian Reports 292 (1880) as a precedent, and to hold that Revised Laws of Hawaii, section 2288, above quoted, is unconstitutional because *contra bonos mores*.

Wherefore, the said appellants, Annie Kealoha and Keoni Williams, pray that the judgment of the said Supreme Court of the Territory of Hawaii rendered in the above entitled suit on the 27th day of April 1906, be reversed, and the said Supreme Court of the Territory of Hawaii be ordered to make an order directing the First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, to overrule the respondent's demurrer to the petition in the said suit.

(Sg.) T. M. HARRISON,
(Sg.) SMITH & LEWIS,
Attorneys for the Appellants.

[Endorsed:] Supreme Court of the United States. Annie
35 Kealoha & Keoni Williams, *vs.* William R. Castle, trustee. Assignment of errors. Filed June 7, 1906. (Sg.) Henry Smith clerk Supreme Court, Ter. Haw. Smith & Lewis and T. M. Harrison attorneys for appellants.

36 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS
vs.
WILLIAM R. CASTLE, Trustee.

Appeal.

The above named parties, Annie Kealoha and Keoni Williams, conceiving themselves aggrieved by the judgment rendered on the 27th day of April 1906, in the above entitled proceeding, do hereby appeal from the said judgment to the Supreme Court of the United States, and pray that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

Honolulu, H. T., 5th June, 1906.

SMITH & LEWIS,
T. M. HARRISON,
Attorneys for the Appellants.

And now, to wit: On the 7th June, 1906, it is ordered that the appeal be allowed as prayed for.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

37 In the Supreme Court of the United States.

ANNIE KEALOHA and KEONI WILLIAMS, Appellants,
vs.
WILLIAM R. CASTLE, Trustee, Appellee.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To William R. Castle, Trustee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Annie Kealoha and Keoni Williams are appellants, and you, William R. Castle, Trustee, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned

should not be corrected, and why speedy justice should not be done the parties on that behalf.

Witness the Honorable Walter F. Frear, Chief-Justice of the Supreme Court of the Territory of Hawaii, this 7th day of June, in the year of our Lord one thousand nine hundred and six.

W. F. FREAR,
Chief-Justice of the Supreme Court of the Territory of Hawaii.

38 [Endorsed:] Supreme Court of the United States. Annie Kealoha & Keoni Williams, *vs.* William R. Castle, Trustee. Appeal & Citation. Filed June 7, 1906. Henry Smith, Clerk Supreme Court Ter. Haw. Smith & Lewis and T. M. Harrison, Attorneys for the Appellants.

Service of the within and foregoing appeal & citation and the receipt of a copy thereof admitted this 7th day of June 1906.

CASTLE & WELLINGTON,
A. T. M. ROBERTSON,
Attorneys for the Appellee.

39 In the Supreme Court of the Territory of Hawaii.

October Term, 1905.

ANNIE KEALOHA and KEONI WILLIAMS, Appellants,
vs.
WILLIAM R. CASTLE, Trustee, Appellee.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Appeal, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 38 inclusive, contain a true and complete transcript of the record and proceedings, including the original Appeal and Citation on Appeal, in said Court in the cause of Annie Kealoha and Keoni Williams, Appellants, against, William R. Castle, Trustee, Appellee, as the same remain of record and on file in my office as the Clerk of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Honolulu, in the Territory of Hawaii, this 7th day of June in the year of Our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundredth and thirtieth.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20573. Territory of Hawaii supreme court. Term No. 230. Annie Kealoha and Keoni Williams, appellants, *vs.* William R. Castle, trustee. Filed February 15, 1907. File No. 20573.

Office Supreme Court, U. S.
FILED
APR 8 1908
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 230.

ANNIE KEALOHA and KPONI WILLIAMS,
Appellants,

vs.

WILLIAM R. CASTLE, TRUSTEE,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

ERRATA IN APPELLANTS' BRIEF.

T. M. HARRISON,
Attorney for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 230.

ANNIE KEALOHA and KEONI WILLIAMS, Appellants, vs. WILLIAM R. CASTLE, TRUSTEE, Appellee.	APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

ERRATA IN APPELLANTS' BRIEF.

The following citations were omitted by mistake from appellant's brief:

"It follows from what has been said that the judgment or decree cannot in general be collaterally attacked for failure to appoint a guardian *ad litem*."

10 Ency. Pl. & Pr. 633.

"A judgment or decree rendered against an infant or affecting his property or interests without the appointment of a guardian *ad litem* is erroneous and invalid, and may be reversed or set aside; but the failure to appoint a guardian *ad litem* for

an infant defendant is not such a jurisdictional defect as will render the judgment void, and hence the judgment remains in full force and effect until it is reversed on appeal or error or set aside by direct proceedings, and is not subject to collateral attack."

22 Cyc. 641.

Respectfully submitted,

Annie Kealoha

Keoni Williams

T. M. HARRISON,

Attorney for Appellants.

FILED
DEC 6 1907
JAMES H. MCKENNEY

In the Supreme Court of the United States

OCTOBER TERM, 1907.

No. 230.

ANNA KEALOHA and KEONI WILLIAMS,
Appellants,
vs.
WILLIAM R. CASTLE, TRUSTEE,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

F. M. HARRISON,
Attorney for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 230.

ANNIE KEALOHA and KEONI WILLIAMS,
Appellants,

vs.

WILLIAM R. CASTLE, TRUSTEE,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

By the Will of J. R. Williams, deceased, of Ewa, Island of Oahu, the Appellee was made Trustee of his Estate and directed, "to retain the entire control of it" during the life of the survivor of the testator's widow and children, to pay the income thereof to them in equal shares, and upon the decease of the survivor to divide the property. (Tr. p. 1.)

The widow and five children survived the testator of whom the widow, and two of the children, Henry and John Williams, were dead when this suit was brought. (Tr. pp. 2, 3, 15.)

The son, John Williams, left surviving him a widow, named Kahalauaole, and three children, the first of whom, Othello, was his son by his first wife, Kahinu. While Kahinu was married to John Williams, Kahalauaole, being then unmarried, bore to him the other two children named Annie and Keoni, who when this suit was brought were of legal age and are the

Appellants. Some years after the Appellants were born, Kahinu died, and thereafter John Williams married Kahalauaole, and recognized the Appellants as his children. (Tr. pp. 2, 3.) The Hawaiian Statute passed in 1866 and prior to the execution of the Will of J. R. Williams, provides, as set forth in Revised Laws, Section 2288: "All children born out of wedlock, are hereby declared legitimate on the marriage of the parents with each other, and are entitled to the same rights as those born in wedlock."

In 1891 the Appellee applied to this Court for instructions as to the disposition of the income of John Williams' Estate, and was directed by the Honorable R. F. Bickerton, to pay a share of it to the Appellants on the theory that they had become legitimate by the marriage of their parents; (Tr. p. 3) and until a year or two prior to the commencement of this suit he paid such income to Kahalauaole for the benefit of all three children, but, as Othello died about that time, he has since then refused to pay any part of the income to either Kahalauaole or the Appellants. (Tr. pp. 3, 16.)

Hence this suit was brought by the Appellants for an accounting and the income of their father's share of the Estate, on the theory that the marriage of their parents rendered them legitimate. (Tr. pp. 3, 4.)

The matter came on for hearing on demurrer in July, 1905, and as the Circuit Judge, after argument, felt unable to follow the decision in *Kekula v. Piociwa*, 4 Haw. 292, in which case the facts were similar to those in this, he reserved the question of whether the Appellants were legitimate children or not, to the Supreme Court of the Territory of Hawaii. (Tr. p. 7.)

The Supreme Court of the Territory decided that the ruling by Mr. Justice Bickerton did not make the question *res judicata*, and followed the decision in *Kekula v. Piociwa*, and held the Appellants illegitimate, saying they were "not prepared to hold the Kekula decision was wrong. Under the Constitution and laws in force at the time of the decision the court had power to declare a statute unconstitutional which it deemed to be *contra bonos mores*." (Tr. p. 9.) The case was sent back to the Circuit Court where a decree was entered sustaining the demurrer and dismissing the Bill. (Tr. p. 10.) This decree was taken to the Supreme Court of the Territory by Writ of Error, and there affirmed for the reasons stated in the decision on the question reserved by the Circuit Judge, and final judgment was entered. (Tr. pp. 12, 13, 14, 15.) From that judgment this appeal is taken. (Tr. p. 19.)

THE ERRORS.

The errors relied on by the Appellants are:

1. It was error to hold that the decision of Mr. Justice Bickerton that the income should be paid the Appellants on the theory they were legitimate, did not make the question *Res judicata.*

2. It was error to hold that the Appellants were not made legitimate by the marriage of their parents, although their father was married to a woman other than their mother when they were born.

3. It was error to follow the decision in *Kekula v. Piocwa,* 4 Haw. 292, and to hold that Revised Laws, Section 2288, was unconstitutional because *contra bonos mores,* in so far as it applied to the Appellants to render them legitimate.

ARGUMENT.

I.

It was error to hold that the decision of Mr. Justice Bickerton that the income should be paid the Appellants on the theory they were legitimate did not make the question Res judicata.

The Supreme Court of Hawaii gives as their reason for holding the ruling of Mr. Justice Bickerton not *res judicata,* that: "It does not appear that any notice was given of the proceedings, or that there was any contest concerning the legitimacy of children." (Tr. p. 10.)

Appellants in their petition (Tr. p. 3) set out they were born out of wedlock while Kahinu was married to their father and the subsequent marriage of their parents, and then state that the Appellee being in doubt "as to the propriety of paying over to the" Appellants "or to anyone in their behalf, their share or any portion of the income of the Estate of said J. R. Williams, deceased, applied to the Supreme Court in Probate, said Court at that time having jurisdiction at Chambers in matters of probate, for instructions as to the standing of said children, and that he was instructed and authorized by the Honorable Richard F. Bickerton, one of the Justices of said Court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents." (Tr. p. 3.) The Appellee certainly had notice of these proceedings, and the Appellants are far from complaining of want of notice on their behalf. So it follows that

so far, at least, as the parties to this suit are concerned the Appellee is not entitled to set up want of notice of the proceedings before Mr. Justice Bickerton as a reason why he should not be bound by the decision rendered in those proceedings. The order was made by Mr. Justice Bickerton in 1891, and since then it has been noticed to *whom it might concern* that the Appellants were entitled to receive their share of their father's Estate on the theory that they are legitimate.

It is plain that the ruling of Mr. Justice Bickerton was concerning the same cause of action as now raised, was between the same parties, and was rendered on the merits of the case by a court of competent jurisdiction. This is all it is necessary a pleading should aver in setting up a former adjudication, (see 9, Ency. Pl. & Pr. 619 et seq.). It certainly is not necessary for the Appellants to plead that the Appellee contested the former proceeding so long as it appears he was a party to it.

9 Ency. Pl. & Pr., 626;
Greely v. Smith, 1, Woodb. & M. (U. S.) 181;
Fed. Case 5749;
24 Ency. Law 735;
30 Cent. Dig. Judgments, Sec. 1181-1183;
Thompson v. Hemenway, 218 Ill. 46; 75 N. E. 791;
Hopkins v. Lee, 6 Wheat. (U. S.) 109;
Washington Bridge Co. v. Stewart, 3 How. (U. S.) 413;
Robbins v. Chicago City, 4 Wall. (U. S.) 657.

The record of the proceedings before Mr. Justice Bickerton is not part of the record in this cause, and as his ruling on the matter was not appealed from it has not been published in the Hawaiian Reports. The record of those proceedings on file in the office of the Clerk of the Supreme Court of Hawaii shows that the facts concerning the birth of the Appellants out of wedlock while their father was married to Kahinu, and the subsequent marriage of their parents, were fully before Mr. Justice Bickerton, by the testimony of Kahalauaole, and the order made by him reads: "The Court orders that the children born out of wedlock were made legitimate by subsequent marriage and must enjoy the advantage of the estate with Othello the child that was born in wedlock of his first wife, and the trustee is authorized to pay the share of the three minor children to the mother Kahalauaole."

If this Court is disposed to affirm the judgment now appealed from because the proceedings before Mr. Justice Bickerton have not been sufficiently pleaded, it is only fair to the Appellants to ask that the Court will indicate that an amendment of

the pleadings more completely stating the facts as just alleged would set forth a good cause of action.

"A claim admitted by the administrator, and allowed and classified by the Probate Court, has the dignity and effect of a judgment."

Tate v. Norton, 94 U. S. 746.

"The administrator was a trustee for the creditors, as well as for the heirs and distributees."

Idem, 752.

"And, although the statutes of the states cannot restrict the equity jurisdiction of the courts of the United States, the rights of parties, as they are given or restricted by the exclusive jurisdiction of the probate courts of the states, are fully recognized in those courts."

Sowles v. First Nat. Bank, 54 Fed. 564, 565.

"This objection was that it appeared from the face of the petition for the sale of the real estate of the decedent that the debts, to pay which it was alleged that the sale was necessary, were barred by the statute of limitations, and that, as a consequence, the Orphans' Court had no jurisdiction to make the order of sale. * * * It is scarcely necessary to cite authority in support of the proposition that the orders, judgments, and decrees of the Orphans' Court, in a case where it had jurisdiction of the subject-matter, cannot be impeached collaterally."

Herron v. Dater, 120 U. S. 464, 477.

"A judgment of the Orphans' Court dismissing a petition for an account, the object of which is to produce a fund out of which a legacy can be realized, is conclusive against him in a proceeding to recover the legacy begun in the common pleas having concurrent jurisdiction."

Wilson v. Smith, 117 Fed. 707.

"The courts of probate in Massachusetts have complete jurisdiction over the probate of wills of both real and personal estate, and its decrees are conclusive upon all parties, and not re-examinable in any other court."

Tompkins v. Tompkins, 1 Story 547;
Fed. Case, 14091.

"Held, in the present case, that the probate of a will by the Supreme Court of the State of Rhode Island, is, under the state laws, final and conclusive upon the validity of the will, to pass real estate in controversy."

Idem.

"Suppose a will should be approved by the proper court of probate, and a partition of the real estate of the testator be made accordingly by the decree thereof, would not such a partition be conclusive upon all the parties in interest? And how can it be conclusive, if the validity of the will is again re-examinable at the common law, toties quoties, whenever any heir or devisee shall choose to contest it?"

Idem.

"The adjudication of a question of descent or pedigree will be binding not only in the proceedings in which they take place, but in every other in which the same question is agitated, and the mode in which the question was brought before the Court is immaterial.

"The Probate Court having determined that a certain relationship exists without reference to the title in any real estate, the related party is entitled to use that decision for the purpose of getting possession of and defending himself in holding any real estate which by such relationship he inherits."

Keahi v. Bishop, 3 Haw. 546;
Pahau v. Keelikolani, 4 Haw. 295;
Rose v. Smith, 5 Haw. 377.

"The conclusiveness of judgments of inferior courts in regard to matters of probate and partition, was stated to be, under statute similar to those of New York; that an actual partition or sale, under a judgment in partition, is effectual to bar the future contingent interests of persons not in esse, though no notice is published to bring in unknown parties, &c. * * * A decree, with regard to the personal status of an individual, will be equally conclusive with a decision upon a right of property; and hence the removal or appointment of an administrator or guardian, or the adjudication on a question of descent or pedigree, will be binding not only in the proceedings where they take place but in every other in which the same matter is agitated, and it is equally well settled that it is immaterial in

what manner the question is brought before the court if it be actually decided."

1 Estoppel & Res Judicata, Herman, p. 480, Sec. 410;
Harrington v. Harrington, 189 Mass. 281: 75 W. E. 632;
May v. Boyd, 97 Me. 398: 54 Atl. 938;
Townsend v. Townsend, 60 Mo. 246;
Womack v. Womack, 23 La. Ann. 351;
Moore's Ex'r. v. Beauchamp, 35 Ky. (5 Dana) 70;
24 Ency. Law, 721.

II.

It was error to hold that the Appellants were not made legitimate by the marriage of their parents, although their father was married to a woman other than their mother when they were born.

The decision in *Kekula v. Piociwa*, 4 Haw. 292, upon which the judgment at bar is based, appears to have been influenced by the Civil Law, the law of Scotland and the Code of Napoleon, all of which expressly stated that the child of a married woman by a man not her husband could not become legitimate by the subsequent marriage of the parents and the acknowledgment of the father. At the time, of that decision, 1880, the Court seems to have had access to few, if any, cases under statutes similar to ours R. L. Section 2288, as the decision states: "We have failed to find a case where a similar act has been held to legitimate offspring of an adulterous intercourse."

Considerations like those that prompted the decision in *Kekula v. Piociwa*, seem to have influenced the Court of Appeals of Kentucky a little later in 1887, when they decided *Sams v. Sams*, 85 Ky. 393; 3 S. W. 593, a case with similar facts. There have, however, been many decisions under statutes like R. L. Section 2288, which hold that as such statutes do not expressly state the exceptions to the general rule, which the Civil Law, the law of Scotland and the Code Napoleon, all expressly stated, they must be interpreted as not creating such exceptions.

Hawbecker v. Hawbecker, 43 Md. 516, was one of the first cases with facts on all fours with that at bar, that was thrashed out at length by the courts. The Kentucky statute, under which that decision was rendered, read: "If any man shall have a child or children by any other woman, whom he shall after-

wards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated and capable to inherit and transmit inheritance as if born in wedlock." Concerning this the opinion states:

"The common law respecting bastards visited the infamy of the transgressions of the parents upon their innocent offspring, and treated the latter as having no inheritance blood. The injustice of this in cases where the parents afterwards married, was so apparent, that at a very early period the law-makers of this state enacted this law as a remedy for it, and did so by the very act by which they abolished the common law rights of primogeniture. * * * No doubt, the legislature, in thus mitigating the severe rule of the common law, intended to hold out to the sinning parents an inducement to marry, and thus put a stop to the mischiefs of further illicit intercourse between them, but in our opinion the main purpose and intent of the enactment we are now considering, was to remove the taint and disabilities of bastardy from the unoffending children, *whenever their parents* did marry, without regard to the deepness of guilt on the part of their parents, in which they were conceived and born. In the few cases in which these Acts have come up for judicial construction, the courts have in terms quite plain, intimated, if not clearly decided, that such was their purpose and object. That appears to us to be the purpose of what was said by our predecessors in the case of *Miller v. Stewart*, 8 Gill 128. But it is more plainly and strongly stated by Ch. J. Taney in delivering the opinion of the Supreme Court in the case of *Brewer v. Blougher*, 14 Pet. 178. In that case, the question was whether the children of an incestuous connection of a most shocking character could inherit from each other, and consequently whether the Act of 1825, Ch. 156, applied to such a case. It was there urged, as it has been here, that the legislature in passing that Act never contemplated such a case, and never intended to give the right of inheritance to the children of an intercourse so deeply criminal. But the reply was: 'It is undoubtedly the duty of the court to ascertain the meaning of the Legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the Court are *satisfied* that the literal meaning of its language would extend to cases, which the Legislature never designed to embrace in it.

" 'In the case before us, the words are general and include all persons who come within the description of illigitimate chil-

dren. And when the Legislature speak in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class.

"'The expediency and moral tendency of this new law of inheritance is a question for the Legislature and not for the Court. This right of inheritance would appear to have been given upon the principle that it is unjust to punish the unoffending offspring for the crime of the parents. The right of the children, therefore, is not made to depend upon the degree of guilt of which they were the offspring. All illegitimate children are the fruits of crime, differing indeed greatly in its degree of enormity. And the Legislature, if it had seen prop r to do so, might undoubtedly have made the right to the inheritance to depend upon the character of the offense committed by the parents. But they have used no language showing any such design. On the contrary, they appear to have looked at the unoffending character of the children, rather than at the criminal conduct of the parents of whom they were the offspring.' This reasoning applies with equal force to the law now before us on the same subject. The legislature has not seen fit to make any exceptions to its operation. Its terms embrace *every* case where '*any man* shall have a child or children by *any woman* whom he shall afterwards marry.' The children of an intercourse adulterous on the part of the man, are no less innocent and we cannot say the Legislature intended to exclude them from the benefit conferred on others, when the language used plainly includes them. Courts cannot put into a statute words which are not there, whether to carry out any ideas of policy, or morals, or expediency which they may entertain. Over these subjects, so far as they may affect or be affected by legislation, the Legislature has exclusive control."

The question was again considered at length in *Ives v. McNicoll*, 59 Ohio St. 402: 53 N. E. 60: 69 Am. St. Rep. 780: 43 L. R. A. 772, the facts in this case only differing from those in the case at bar, in that the plaintiff was born while her mother was married to a man other than her father. Thus she came fully within the express exception created by the Civil Law, the law of Scotland and the Code Napoleon. The statute on which this decision is based, Rev. Stat. of Ohio, Section 4175, is: "When a man has by a woman one or more children, and afterwards intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate." This statute is copied from a Virginia Statute of 1785 concerning which the decision reads: "The bill was drafted and

reported by a committee, of which Thomas Jefferson was one, after some years of deliberation, and was adopted by the Virginia legislature, omitting the exception of the civil law and the law of Scotland as to adulterine bastards, and disregarding the common law of England, which prevented all bastards from being legitimate."

The decision refers to several Virginia cases in which the statute was held to legitimate adulterine bastards.

The next paragraph reads: "As the exception as to adulterine bastards existed in the civil law and in the law of Scotland and was omitted from the Virginia statute, it must be presumed and held that such omission was intended, and that it was the purpose of the Virginia legislature to wipe out the exception as to adulterine bastards and to permit them to be legitimated the same as other bastards. When the legislature of this state adopted the Virginia statute in 1805 it was familiar not only with the Virginia statute, but also with the civil law, the law of Scotland, the common law of England, and the Code Napoleon, and the omission of the exception as to adulterine bastards was not in ignorance of those laws, but was with the purpose of wiping out the exception, and doing justice to the innocent offspring."

With regard to the objection that if the statute were considered to include adulterine bastards, although its language is broad enough to do so, it would be against public policy, the Ohio decision states: "There can be no public policy in this state in conflict with a valid statute of the state. Public policy must always yield to a valid statute. The general assembly has the power to enact a law legitimating adulterine bastards, and there would be no absurdity in so doing. Neither would such a statute disturb the general law protecting the marriage relation nor the law of crimes and misdemeanors, nor the law as to public morals. The subject of marriage and divorce, and the subject of adultery and fornication, and the subject of public morals are all carefully provided for and protected by separate chapters and sections of our statutes, and if the general assembly desired to prevent adulterine bastards from becoming legitimated, some provision to that effect would be found in some of the statutes. No such provision is found, but, on the contrary, section 4175 of the Revised Statutes has been enacted.
* * *

"The force and effect of this section begin after the sections as to marriage, divorce, adultery, fornication and public morals have expended their force. * * *

"Neither would such a statute encourage married persons to forsake their marriage vows and cohabit with others in anticipation of a future marriage with a view of thereby making their offsprings legitimate. The adulterous connection is not had with a view to subsequent marriage and legitimating children, but with a view to present pleasure: and the ardent hope and desire usually exists that no offspring should result therefrom: and this section was enacted to enable parents, when all impediments to a legal marriage should be removed, to intermarry and recognize and acknowledge their offspring, and thereby in a measure atone for the sins of the past, and do justice to their innocent and unfortunate children. Viewed in this light the statute is a righteous enactment. While to visit the sins of the parents upon the innocent and helpless offspring, would shock every sense of right and justice.

"Again, it is clear that after the birth of an adulterine bastard, all obstacles being removed, parents may legally marry and enjoy all the rights and privileges of marriage. They may inherit from each other under our statute, and to allow them to marry and enjoy all the fruits thereof and deprive their offspring from inheriting from them would seem rank injustice: and it cannot be presumed, without clear words to that effect, that the legislature intended such unjust result. To so hold would be to reward the guilty parents, and punish the innocent offspring. * * *

"If the purpose of our law is to punish the bastard children for the errors of the parents, to be consistent, the children should be prevented from inheriting from the mother, as well as the father, after marriage of the parents. It is said that the mother always is known. But when the father marries the mother and recognizes and acknowledges the children as his own, he thereby makes himself known, and thereafter there is no more reason for denying inheritance to them from him than from her. (Here follows authorities in support of the above opinion.)

"The only adjudged case opposed to these authorities is *Sams v. Sams*, 85 Ky. 396."

Other cases that follow *Ives v. McNicoll*, although they do not give the reasons for the decision as fully as they are set out in that case, are:

"Where a marriage takes place between a divorced woman and father of her child begotten and born during her former coverture, and the child is acknowledged and treated as his, it is thereby legitimated."

Sutphin v. Cox, 2 Ohio Dec. 90; 1 West. Law Month. 346.

"Children born before the marriage of their parents, who afterwards intermarry, whether such subsequent marriage is valid or null, it would seem, are legitimate by the statute. And that though the subsequent marriage was null because the husband had another wife living and not divorced to the knowledge of his second wife."

Carroll v. Carroll, 20 Texas 732.

Other cases that hold the same as those quoted are:

Monson v. Palmer, 90 Mass. (8 Allen) 551;
Adams v. Adams, 36 Ga. 236;
State v. Lavin, 80 Iowa 556; 46 N. W. 553;
In re Schmidt, 87 N. Y. S. 428;
Townsend v. Van Buskirk, 68 N. Y. S. 512; 33 Misc. Rep. 287.

The reason for holding that an adulterine bastard should become legitimate by the marriage of the parents, seems to rest on the principle that the child being innocent should not be punished in order to punish the guilty parents. One of the most elementary axioms of modern law is that none but the guilty should be punished for any offence, or, "it is better that nine guilty men escape than that one innocent man should be convicted." If this principle were not strictly adhered to it would tend to bring the administration of justice into popular contempt, and to make it difficult to obtain evidence lest those might suffer who had committed no offense.

In visiting the sins of the parents on the innocent offspring the punishment often reaches the child most severely after the parents' death, in cases like the one in question; and that because during their lives the parents have neglected to make wills to obviate such a result, this neglect, in itself, showing the injury to the child had not been considered or felt by the parents and that the child alone had suffered. On the other hand if the guilty parents are to be punished, it is quite easy to enact statutes to punish them directly without attempting to play upon their finer feelings of sympathy for the unfortunate position in which they may place possible offspring, when, in fact, at the time such offenses are committed such finer feelings probably do not exist in the guilty parties.

The principles laid down in *Hawbecker v. Hawbecker* and *Ives v. McNicoll* have already been cited by this Court with approval in *Brewer v. Blougher*, 14 Pet. 178, referred to at length in the Hawbecker case.

It has been contended by the Appellee that the decision in *Kekula v. Pioeiwa*, has become a rule of property in Hawaii, and that to change it might unsettle titles and vested rights.

An examniation of what constitutes *stare decisis* and a rule of property, will make it very evident that no rule of property has been established by the Kekula case; while, even if a large amount of property rights had been acquired through that decision, there are instances of cases being overruled which have affected the title to half the real estate within the jurisdiction of the Court.

In the report of *Chesnut v. Shane's Lessee*, 16 Ohio St. 599; 47, Am. Dec. 387, it appears, under an act, which directed that an officer, taking the acknowledgment of a married woman to a deed, should explain the contents of the deed to her separate and apart from her husband, and ask her if she had executed it without coercion from her husband, and if she should say she had executed the deed freely and without coercion, then he should certify the same, it had been held by the Courts from the first organization of territorial government, that it was not necessary to the validity of such a deed that the officer's certificate should allege that he had explained the contents of the deed to the feme covert. In 1835, in *Connell v. Connell*, 6 Ohio 353, the execution of a deed by a married woman was held invalid because the certificate did not allege that the officer knew she understood the contents of the deed. Later in 1835 an act was passed making deeds valid which had certificates such as had been held insufficient in *Connell v. Connell*. On these facts the decision reads: "This act" (of 1835) "quieted the public mind, received the public approbation, and for eight years was sustained by all the inferior courts, and sanctioned by repeated decisions of the supreme court upon the circuit. But in 1843, in *Good v. Zercher*, 12 Ohio 364, and *Meddock v. Williams*, *Id.* 377, this court felt bound under its solemn conviction of duty to pronounce the act of 1835 an infraction of the constitution, and, therefore, void, and also to reaffirm the principles of the decision in *Connell v. Connell*." The decision then overrules *Good v. Zercher* and *Meddock v. Williams*, and changes a rule of property which "affected half the vested titles to real estate in the state."

"Even if the decision affects real estate interests and titles there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well settled principle of law can

be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Wherever a correction can be made without working more harm than good, it should be done."

26 Ency. Law, 183.

According to *Green v. Neal*, 6 Pet. 291: 6 L. Ed. 402, it had been held until 1828 that the statute of limitations of 1797 barred the right to bring action against one holding by seven years' adverse possession, if he held under a grant or under a deed founded on a grant. In 1828 it was held in *Gray & Reeder v. Darby's Lessee*: "That if he prove an adverse possession, under a deed, of seven years before suit is brought, and show that the land has been granted, he brings himself within the statutes." When the courts of Tennessee again followed the older decisions that were law before 1828, the supreme court of the United States sustained the decision in *Gray & Reeder v. Darby's Lessee*.

By *Hall v. Newcomb*, 3 Hill (N. Y.) 283, the law of the liability of endorsers of notes was materially changed and *Herrick v. Cannan*, 12 Johns. 161, together with the cases of *Campbell v. Butler*, 14 Id. 349 and *Nelson v. Dubois*, 13 Id. 175, were commented on and disapproved.

" 'Stare decisis' means that when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases; but precedents may be departed from when necessary to vindicate plain and obvious principles of law, or to remedy a continued injustice."

The Madrid, 40 Fed. 677.

By the last quoted case the law of maritime liens involving numerous contracts concerning property of great value was changed.

There has, however, been no case tried in Hawaii since *Kekula v. Piocira* was decided, in which the question at issue has arisen, and from the limited number of reported instances, not only in this Territory, but elsewhere, in which this point has been passed upon, it appears that such cases are unusual. It is submitted there is no ground for the court to presume that property has vested without controversy under the law as interpreted in *Kekula v. Piocira*, to such an extent as to make that decision a rule of property.

A decision can only be said to have become a rule of property, "when a court of last resort has announced principles affecting

the acquisition of title to real property, and the principles thus announced *have become established and have been frequently recognized and conformed to, and property rights have been acquired thereunder.*" 26 Ency. Law, 181.

It cannot be said that the principle laid down in *Kekula v. Poiciwa, "has been frequently recognized and conformed to."* While Mr. Justice Bickerton's order that the Appellants should "enjoy the advantages" of their father's estate shows the Kekula case has not been regarded as a rule of property or even a precedent.

Other authorities, which show that *Kekula v. Piociwa* does not constitute a rule of property which should control this case, are:

"When a question involving important public or private rights extending through all coming time has been passed upon on a single decision, and the decision can in no just sense be said to have been acquiesced, it is not only the right but the duty of the courts, when properly called upon to re-examine the questions involved and again subject them to judicial scrutiny."

26 Ency. Law, 167.

"The rule of stare decisis is not always inflexible, and when there has been but a single decision, which is clearly erroneous, or where the questionable matter was not necessarily involved in the case, or where the points involved were decided contrary to well established legal principles, or where it appears that facts and conditions were materially different, or where it is manifest that the law has been erroneously decided, the doctrine ought not to be applied."

Kimball v. Grantsville City et al., 19 Utah 368: 57 Pac. 1.

"Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of Stare decisis was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it."

26 Ency. Law, 184.

"There is a class of cases, undoubtedly, which the same or subsequent court would be fully justified in overruling, and which often are overruled—recent cases under which valuable rights have not yet been acquired, which stand alone or nearly

alone, and which are manifestly erroneous and are themselves departures from the law, as before well settled; and others not necessary to mention. But many, if not most of them, are overruled in some sense upon the very doctrine of stare decisis. It is very true that a single decision upon a point recently made, does not necessarily fall within the principle of stare decisis."

Hihn v. Courtis, 31 Cal. 399.

"Decisions affecting rights to property should be uniform and stable; but in cases where the settled rules and reasons of the law have been departed from, it becomes the duty of the court, before the error has been sanctioned by repeated decisions, to embrace the first opportunity to pronounce the law as it is."

The text of this decision reviews this question much more fully than can well be quoted in a brief.

Frink v. Darst, 14 Ill. 304: 58 Am. Dec. 575.

"When a question involving important public interests has been passed upon a single occasion, and the decision cannot be said to have been acquiesced in, it is the duty of the court, when properly called upon, to re-examine the questions involved and to overrule the former decision if convinced that it was incorrect."

Montgomery City Fiscal Ct. v. Trimble, 104 Ky. 629: 47 S. W. 773.

"Though, on questions of practice, previous decisions are entitled to very great weight, still a single decision, made without notice of a statute, and in fact setting aside the statute, cannot be invoked as authority on the principle of stare decisis."

Duff v. Fisher, 15 Cal. 376.

"Courts are not bound to perpetuate errors merely upon grounds that a previous erroneous decision has been rendered on a given question, for if it is wrong, it should be reversed, unless it has been so long the rule of action, and relied upon to such an extent that greater injustice and injury will result by a reversal than to observe and follow it."

Calhoun Gold-Min. Co. v. Ajax Gold-Min Co., 27 Colo. 1: 59 Pac. 607.

"But the highest regard for the doctrine of stare decisis does not require its observance when a plain rule of law has been

violated. The decision in *Toothaker v. Cornwall,* is in direct conflict with the law, as to presentation and notice, as settled by all the authorities, both of England and the United States."

McFarland v. Pico et al., 8 Cal. 631.

"But by statute all judgments rendered on gambling contracts are void, and may be set aside and vacated by any court of equity upon bill filed for that purpose, although the character of the contract could have been set up as a defense in the suit at law in which such judgment was rendered, and the party had knowledge of the defense and omitted to assert it. The case of *Abrams v. Camp,* 3 Scam. (Ill.) 290, is overruled upon this question."

Mallett v. Butcher et al., 41 Ill. 382.

In *Barnhizel v. Ferrell,* 47 Ind. 335, it was held: "That an adoptive parent would be excluded and preference given to the natural kinsmen of the child." This case was overruled by *Paul et al. v. Davis,* 100 Ind. 422, which held: "Judicial decisions are evidences of the law, but where they are not long established, and are palpably erroneous and plainly productive of injustice, they should be overruled, and a party who buys lands during a pending litigation can not hold it as a bona fide purchaser solely on the ground that in former decisions the court had declared the law to be as claimed by his grantor."

"Courts of final review are bound by the rule of stare decisis, both as a canon of public good and a law of self-preservation. Nevertheless, where a grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, the maxim which applies is *fiat justitia ruat coelum.*"

Ellison v. Ga. R. & B. Co., 87 Ga. 691: 13 S. E. 809.

In *Leavitt v. Blatchford et al.,* 17 N. Y. 521, an important principle of banking law is laid down overruling on the same point, *Gillet v. Moody,* 3 N. Y. 479; *Talmage v. Pell,* Id. 328, and *Gillet v. Phillips,* 13 Id. 114.

"The doctrine of stare decisis does not apply where it can be shown that the law had been misunderstood or misapplied, nor where the former decision is evidently contrary to reason. Hasty or crude decisions should be examined without fear and reversed without reluctance."

The last quoted case, *Rumsey v. New York, etc., R'y. Co.,* 133 N. Y. 79: 28 Am. St. Rep. 600, was a matter involving the title of riparian owners.

"We do not violate it" (the rule of stare decisis) "when we declare that a decision made four years ago in opposition to all previous legislation" (in other states) "and jurisprudence, is open to correction." * * *

"If it should be said that the principle of the decision in *Ewing v. Furness* has entered into the customs and practice of the country then the claim that it should stand as law would be founded upon a different principle, expressed in the maxim communis error facit jus. If such a custom has arisen in this instance, it has had but a short life, and secured but a frail title to perpetuity."

Callender v. Keystone Mut. Life Ins. Co., 23 Pa. St. 471, 475.

"When the varied surface of this earth is changed into a dead level, and the ocean's waves are still, then man will need another habitation. And when the variety of human action and development is subjected to judicial and legislative prescription and the rule of man's free and educated reason is prescribed, with all its improving diversities, and all reasoning becomes illegal, if the subject has been already reasoned upon by judges or decided upon by them without reasoning, then man will need another jurisprudence, and another legislation, without, perhaps, being capable of enjoying them."

Idem. 474.

In *Hart v. Burnett*, 15 Cal. 530, "the current decisions in relation to San Francisco land titles," were reversed, when, "the immense interests involved in the decision," had "drawn to it a laborious and careful examination by numerous able counsel."

In *Jones v. Madison County*, 72 Miss. 778: 18 So. 87, decisions affecting the titles of many of those who held from the state were reversed.

Smith v. Ackers, being a decision concerning the rights of creditors as against a chattel mortgagee, it was held, "that though the decision in *Smith v. Ackers* was binding on the parties to the particular suit, it should not be followed as a precedent."

Butler v. Van Wyck, 1 Hill (N. Y.) 438.

"Where state statutes, affecting the title to large tracts of land, have been construed by the state supreme court," and

such decisions affirmed by the United States Supreme Court, "when the title is again called in question, comity does not compel a federal court to follow a later decision of the state courts adverse to the title established by the earlier decisions."

Wilson v. Ward Lumber Co., 67 Fed. 674.

"No absolute rule can be given as to when stare decisis is imperative, so much depends on the particular case in which it may be invoked. For it must be confessed that hasty and ill-considered decisions are sometimes made, and even of such a nature as to become rules of property; decisions so obviously against law that they ought in vindication of the law, to be overruled, and in a multitude of instances have been."

2 Lewis' Sutherland's Stat. Con. (2nd Ed.) Sec. 482, p. 901.

"'The two grounds of justification,' says Mr. Wells, 'in departing from even a single decision which has become a general rule of property within a certain line of dealing, are (1) the necessity of preventing further injustice; (2) the necessity of vindicating clear and obvious principles of law.' Wells on stare decisis."

Lewis' Sutherland's Stat. Con. (2nd Ed.) Sec. 483, p. 902.

Other cases in point, on the question of stare decisis herein are:

San Francisco v. Spring Valley W. W., 48 Cal. 493;
Harvey v. Travellers' Ins. Co., 18 Colo. 354; 32 Pac. 935;
Jasper County v. Allman, 142 Ind. 573; 42 N. E. 206;
Boon v. Bowers, 30 Minn. 246; 64 Am. Dec. 159;
Stern et al. v. Lee et al., 155 N. C. 426; 20 S. E. 736;
Weston v. Ralston, 48 W. Va. 170;
Judson v. Gray, 11 N. Y. 408;
Hebbits v. Jack, 97 Ind. 570; 49 Am. Rep. 478;
Adams v. Yazoo, 47 Miss. 194; 24 So. 200;
Higgins et ux. v. Bordages, 88 Tex. 468; 31 S. W. 803;
Jackson County v. State, 155 Ind. 604; 58 N. E. 1037;
Young v. Downey et al., 150 Mo. 317; 51 S. W. 751;
Rogers v. Green, 1 Scam. (2 Ill.) 42;
Postal Tel. Cable Co. v. Farmville & P. R. Co., 96 Va. 661; 32 S. E. 468;
Aud v. Magruder, 10 Cal. 283;
Pratt v. Breckinridge, 65 S. W. 136, (Ky.);
Mt. Grove Bank v. Douglas City, 146 Mo. 42; 47 S. W.
Groesbeck v. Golden, Texas (7 S. W. 362).

III.

It was error to follow the decision in Kekula v. Piociwa, and to hold the Revised Laws, Section 2288, was unconstitutional because contra bonos mores, in so far as it applied to the Appellants to render them legitimate.

The decision appealed from in referring to R. L. Section 2288 reads:

"The Statute in question was held in *Kekula and husband versus Piociwa and Pakee*, 4th Hawaiian 292 (1880), to be inapplicable to offspring of an adulterous intercourse, the court saying that 'any other construction of this Act would be subversive of good morals and we cannot think that the legislature so intended it.'

"The plaintiffs do not deny that the decision applies to their case, but they claim that it is bad law and ought not to be treated as a precedent, and moreover that the instruction given to the testator by Justice Bickerton makes the matter *res judicata* during the entire administration of the trust estate.

"We are not prepared to hold the Kekula decision was wrong. Under the Constitution and laws in force at the time of that decision the court had power to declare a statute unconstitutional which it deemed to be *contra bonos mores*.

"An instance of the exercise of this power is *Kinimaka v. Ah Fai*, 3 Haw. 631, in which the court held that a statute is unconstitutional and void as contrary to public policy and morality which enacts that: 'No marriage of a Hawaiian woman with a Chinaman shall be invalid by reason of a previous marriage of such Chinaman in China,' provided that such marriage shall have been unknown to such Hawaiian woman, at the time of her marriage. In the exercise of its discretionary power the court in the Kekula case could properly have held that the Act as applied to the facts of that case was unconstitutional because in such application the act would be immoral, or the same conclusion could be reached, and in fact was reached, by considering that the legislature did not intend such application by the Act. Whether we should take the same view as was taken by the court in that case or not, the decision is a precedent which we do not see fit to disregard. Nor are we prepared to say that if the question were now presented *de novo* we should take any other view of the matter than was taken in that case." (Tr. pp. 9, 10: 17 Haw. 45, 47, 48.)

From the language just quoted it would appear that the Supreme Court of Hawaii does not merely hold that the Appel-

lants do not come within the statute, but goes further and holds the statute unconstitutional, as contrary to public morals, in so far as the offspring of an adulterous intercourse comes within its language. It therefore, follows that any statute which the legislature might pass for the purpose of rendering the children of an adulterous intercourse legitimate by the marriage of their parents, would be unconstitutional. Consequently, if the decision at bar is affirmed, it means that this Court holds that any such statute passed by the Territorial Legislature is unconstitutional, and that the reasoning in *Hawbecker v. Hawbecker* and *Ives v. McNicoll* is wrong. It is, therefore, submitted that the judgment at bar should be reversed.

Respectfully submitted,

Annie Kealoha.

Kenj. Williams

T. M. HARRISON,

Attorney for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 230.

ANNIE KEALOHA and KEONI WILLIAMS,
Appellants,
vs.
WILLIAM R. CASTLE, TRUSTEE,
Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANTS' BRIEF IN REPLY.

T. A. HARRISON,
Attorney for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

ANNIE KEALOHA and KEONI WILLIAMS, Appellants, vs. WILLIAM R. CASTLE, TRUSTEE, Appellee.	APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

APPELLANTS' BRIEF IN REPLY.

In this brief only matters presented by the Brief for Appellee and not touched upon by the Appellants' first brief, will be noticed.

I.

Counsel for the Appellee states:

"The alleged decision of Mr. Justice Bickerton is not res judicata."

The Brief for the Appellee says: "The trustee applied for instructions to the Probate Court. But that court had no jurisdiction over trusts or trustees. Justice Bickerton, sitting as a probate judge, was without any authority to give the trustee any directions."

Revised Laws (1905), Sec. 1648: Civil Laws (1897), Sec.

1145, give to, "Circuit Judges at Chambers" jurisdiction:

"First. To hear and determine all matters in equity." * * *.

"Third. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executors, administrators or guardians; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates."

Revised Laws (1905), Sec. 1834, cited by Appellee, states more fully this equity jurisdiction, while *Chapter 122* enlarges on the Probate procedure.

As appears by both the cases cited by the Appellee, viz:

Estate of Brash, 15 Haw. 372; and *Long vs. Holt*, 18 Haw. 290, it had been the practice, at least prior to 1904, for executors, who were also trustees appointed under a will, to have their successors appointed by a Circuit Judge at Chambers, nominally, sitting in probate, and for both such trustees and their successors, when they applied to such Circuit Judges at Chambers for advice or instructions concerning the administration of their trusts, to entitled such proceedings in probate. In any event, such advice or instruction was within the jurisdiction of a Circuit Judge at Chambers.

The law, as laid down in both these cases, appears to be:

"Where the will gives to the executor named discretionary powers and duties involving personal trust and confidence, and which do not ordinarily come within the scope of administrative functions, they do not pass to an administrator with the will annexed, although such administrator is, by statute or a decree of court, expressly invested with powers of and subjected to the same duties as an executor named

in the will, unless it clearly appears from the will that the testator intended to confer the powers and duties upon the executor merely *virtute officii*, and that they should be exercised in any event."

18 Cyc. 1322.

"If no provision be made by the will for such substitution, the powers do not become extinguished, but the case falls within the category of those where a court of equity will not permit a trust to fail for want of a trustee, but will appoint one and clothe him with authority adequate to the duties to be discharged."

Ingle vs. Jones, 19 L. 624: 9 Wall. 498;

See Hayes vs. Pratt, 147 U. S. 567: 37 L. 283.

But whether or not a Circuit Judge at Chambers is without jurisdiction in Hawaii to appoint a trustee, with discretionary powers under the will exceeding those of an administrator, to succeed the one nominated by a will, because the proceeding is entitled in Probate, it was not necessary that the appellee in this case should be appointed trustee by a Court of Equity, as he derived his authority from the Will of J. R. Williams (Tr. p. 1); and the probate of that Will by a Circuit Judge at Chambers, in probate, certainly made him an executor with the discretionary powers created by the will without farther appointment, irrespective of what Court may have jurisdiction to appoint or advise his successors in trust, if such are ever required.

The petition (Tr. p. 3) states: The appellee, "applied to the Supreme Court, in Probate, said Court at that time having jurisdiction, at Chambers, in matters of probate." This statement, on demurrer, must be taken to be true. Furthermore, if evidence is required, the record of the proceedings in the Supreme and Circuit Courts of the Hawaiian Islands in the mat-

ter of the Estate of J. R. Williams, deceased, show, that when the decree of Mr. Justice Bickerton was made, the appellee had not rendered his final accounts or been discharged as executor of the Estate of J. R. Williams, while the decree itself is fully within the jurisdiction of a Probate Court, as it does no more than determine the heirs of the decedent under his will and decree the distribution of the Estate, all of which powers are given in Revised Laws (1905), Sec. 1648, sub-division Third quoted above. Again the authority of a Circuit Judge at Chambers in Probate to decree distribution is fully recognized in the case cited by the Appellee, *Long vs. Holt*, 18 Haw. 290, 297: which refers, to the authority of an administrator with the will annexed, as follows:

"So if they were anything, they must have been administrators with the will annexed with no duties except that of distribution."

"As a general rule the duty of an executor or administrator is confined to collecting and paying out or distributing the assets of the estate, and it is no part of his duty to invest funds belonging to the estate. This duty may, however, be imposed upon him by will or by statute, or a duty to invest may sometimes arise from the necessities of the case, where there is considerable and unavoidable delay in settling up the estate and making final distribution."

18 Cyc. 253.

"In many states jurisdiction has been conferred upon probate courts in respect to testamentary trusts, but such jurisdiction is merely concurrent and does not oust the general equity jurisdiction. Which ever court first obtains jurisdiction will retain it and take precedence."

22 Ency. Pl. & Pr., 24.

"Before an executor is entitled to a discharge from official responsibility as such on the ground that the fund coming into

his hands as executor has, pursuant to the terms of the will, become converted into a trust fund, for which he is only liable as a trustee to account in a court of equity, he must show some act done to change the character of his holdings, and that the fund is properly placed."

In re Sanborn's Estate, 109 Mich. 192.

The will made the executor also trustee with power to sell real estate, carry on business and to pay the income to testator's wife and children during their lives; and the Court held:

"It is unquestionably true that the same person may be named as executor in a will, and by the same instrument constituted a trustee. Whether these executors are constituted trustees, in such a sense that they might, upon a final accounting, discharge themselves from the obligation of their bond by showing a proper investment of the remaining assets in their hands, we need not determine. No such accounting has been had in this case, and the executor insists that it is not his duty to make one, although annual accounts were for years rendered to the probate court, in which no attempt was made to distinguish the trust funds, or show where or how invested, as distinguished from the general funds of the estate. Assuming that the will creates such a trust as is contended, we think that, before the executor can discharge himself of his official responsibility, he must do some act to change the character of his holding, and show that the fund is placed safely where it ought to be. This question has been considered by the courts of many of the States, and this duty is recognized in the better reasoned of the cases in which the question has been raised, *In re Hood's Estate,* 98 N. Y. 363; *In re Higgins Estate,* 15 Mont. 474; *Hall vs. Cushing,* 9 Pick. 395."

Idem. 196.

"Even where by the terms of a will an executor may become a trustee simply, his liability as executor continues until there

has been a final accounting, and a discharge by decree of the surrogate or a direction in such decree that he hold the fund thereafter as trustee, and an entering by him upon the duties of trustee as distinct and separate from those of executor."

In re Hood's Estate, 98 N. Y. 363.

"Nor does the decree of the surrogate in 1869, made upon the settlement of the accounts of the executor Frederick Hood, contain any provision to the effect that from the time of that decree the executors ceased to act as such and thereafter became trustees, or indicate any intention to discharge the executors. On the contrary, it declares 'that the balance of said moneys, being the sum of $53,710.69, said executors shall hold and invest pursuant to the powers and directions in said last will and testament,' thus assuming that the estate then was and would continue in their hands to be held and invested by them as such executor." Held that the executors were accountable to the surrogate for their management.

Idem, 368.

"Executors, when qualified as such, are subject to the jurisdiction of the district court, sitting in the exercise of its probate powers. And the duties of such executors are to proceed with the performance of their executorial duties, as imposed upon them by the laws of the state, *having due regard to the provisions of the will of the decedent.*"

"Where trust duties are imposed upon persons named as executors under will, and such persons have duly qualified as executors, they cannot properly assume the rights and duties of trustees until the court has approved their accounts as executors, and ordered a distribution of the estate, in which order the executors may be directed to credit their accounts as executors with so much of the estate as may be ordered transmitted to their accounts as trustees."

In re Higgins Estate, 15 Mont. 474.

To like effect see:

Hall vs. Cushing, 9 Pick. (Mass.) 395.

Counsel for Appellee states:

"The proceeding before Justice Bickerton was not in rem. In Hawaii the jurisdiction in probate to decree heirship is confined to proceedings for the distribution of intestate estates and limited to the distribution of personal property."

Both the cases cited in support of this quotation, that is, *Smith vs. Hamakua Mill Co.*, 13 Haw. 245; and *Mossman vs. Government*, 10 Haw. 421, merely go to the extent that the administrator of an intestate has no authority over his real estate so long as the personal estate is sufficient to pay his debts; and that under such circumstances a probate court cannot decree the distribution of real estate.

Session Laws, 1876, Chap. 57, Sec. 1; *Revised Laws (1905), Sec. 1855*, gives probate courts in Hawaii power to decree the sale of real estate of deceased persons when the personal estate is insufficient to pay their debts.

It also appears that a large portion of the estate in dispute is personal property. (Tr. p. 15.)

"Neither an executor nor an administrator has, as such, any inherent interest in title to, or control over the realty of his decedent. The testator may, however, by his will, give to his executor such authority and control over real estate as he sees proper."

18 Cyc. 297.

"Where a testator gives real and personal estate to his executor in trust, to sell and invest the proceeds for the purposes of the trusts specified, under the doctrine of equitable conversion, the real estate is to be considered as personalty: the proceeds of sales, when received by him, become legal assets in the hands

of the executor as such, and he is bound to account, before the surrogate, therefor. He is also compellable to account, as executor, for the rents and profits."

Hood vs. Hood, 85 N. Y. 561.

See to same effect *Staggs vs. Jackson,* 1 N. Y. 206, where property real and personal was left to executors, in trust, for beneficiaries, with power to sell and reinvest.

Citing:

Bogert vs. Hertell, 4 Hill, 492;
Ram on Assets, 206:
Leigh vs. Dalsell, on con. of Prop., Ch. 1, 2, 3;
Smith vs. Claxton, 4 Mad. 484
Marsh vs. Wheeler, 2 Eden. Ch. R. 157;
Doughty vs. Bull, 2 P. Wms. 320;
Deg. vs. Deg., 2 P. Wms. 415;
1 Jarman on Wills, Ch. 19.

"Under the general provision of the 851st Section of the Civil Code (Revised Laws (1905), Sec. 1648, Sub. Sec. 3rd, ubi supra), full powers are vested in the Probate Courts of this Kingdom to compel executors to perform their trusts, by making any necessary order, as the circumstances of the particular case may require, upon a proper application for the purpose being made before the Court."

Estate of Gill, 2 Haw. 699.

"It is argued, and I think with great force, that, under a fair construction of this provision (C. C. Sec. 851), this Court possesses all the powers that a Court of Equity could exercise in the premises. Nay, I conceive even more, for while a Court of Equity might, in a case calling for that species of relief, appoint a receiver, this Court could remove an executor appointed by will, and appoint another in his place, in the shape of an ad-

ministrator cum testamento annexo, which a Court of Equity could not do."

Idem, 700.

"Where a court of probate having jurisdiction for that purpose, has construed a will, a court of equity will not take jurisdiction of a suit subsequently brought to determine the same question."

22 Ency. Pl. & Pr., 1199.

Counsel say that: "The parties interested were not before the Court." The appellee in this case is the only party now before the Court other than the appellants; and he certainly was before Mr. Justice Bickerton. In any event, they quoted no authority which shows, that the appellee, as executor and trustee, did not fully represent all the beneficiaries under the will, as appears by the authorities cited in our first brief.

They cite equity cases to show that the parties interested were not before the court, but the rule in probate where all parties interest are originally advertised for is not always the same as that in equity. And furthermore the equitable authorities they cite do not bear out their contention.

In *McArthur vs. Scott,* 113 U. S. 340, the report at page 393 states: "No executor and general trustee under the will was made a defendant in the capacity of executor or trustee."

In *Collins vs. Loffters,* 10 Leigh. 5, 10; *Simon of Ellison,* 90 Pa. 157: 17 S. I 836; and *Gordon vs. Green,* 113 Mass. 259, it appears that the beneficiaries, whose interests were adjudicated, without them being joined with their trustee, were of full age and competent to become parties and that their interests where not before the court, furthermore these cases were decided under local statutes and procedure; while Storys' Equity Pleadings, Sec. 207 et seq. recognizes the capacity of a

trustee to represent beneficiaries, who are incapable by absence or otherwise of representing themselves.

Counsel for the Appellee claim: "In controversies between beneficiaries, the trustee is required to stand neutral."

There is nothing in the record to show that the Appellee has in anw way favored the claims of the Appellants, in fact, his position in the case at bar appears to be the reverse.

The law on this point seems to be:

"This doctrine tersely stated, is to the effect that where it appears that a particular party, though not before the court in person, is so far represented by others who are before the court that his interests receive actual and efficient protection, his actual joinder may be dispensed with, and the decree may be held to be binding upon him."

15 Ency. Pl. & Pr., 627.

Meux vs. Maltby, 2 Swanst. 281.

"In the absence of fraud and collusion the parties represented are bound by the decree."

15 Ency. Pl. & Pr., 635.

"So also the executors or administrators of a decedent are the duly constituted representatives of creditors, legatees, and distributees, and such persons are not usually necessary or even proper parties in suits by or against the executors or administrators in his representative capacity.

Idem, 641.

The decree of Justice Bickerton ordered, "that the children born out of wedlock were made legitimate by subsequent marriage and must enjoy the advantage of the estate with Othello, the child that was born in wedlock of his first wife." Hence the estate or the subject matter now in dispute was disposed of by that decree.

There is no doubt that the interests of all the parties to the suit at bar was before the court in that proceeding and that they, also, all had constructive notice thereof.

"The general rule is that a judgment is void as to one entitled to be heard who had no notice, actual or constructive; but if there was notice, then as to the subject of the proceeding the judgment is in every other proceeding conclusive, not only upon every point that was litigated in the first proceeding, but upon every point that might have been litigated."

Mossman vs. Government, 13 Haw. 421, 424, ubi supra.

The last quotation is from an opinion of Judd, C. J., concerning a judgment of the Probate Court, and is in harmony with his dissenting opinion in *Keahi vs. Bishop*, 3 Haw. 546, 555, a case cited in Appellants' first brief.

The last quotation also disposes of Appellee's contention in referring to the decree by Justice Bickerton, that, "it does not appear that the court's attention was then called to the case of *Kekula vs. Piociwa.*"

It would certainly be astonishing if a decree could be set aside, in a collateral proceeding, by merely showing that although the evidence was fully before the court, yet it did not appear some argument or authority had been presented. Furthermore, at the time of Mr. Justice Bickerton rendered the decree the case of *Kekula vs. Piociwa*, 4 Haw 292, (1880), had long been published, and it is not to be presumed it was overlooked by him.

II.

Counsel for the Appellee state: *"The Kekula case is an 'Hawaiian judicial precedent,' conclusive in the decision of the case at bar."*

This point has been treated of at length in Appellants' first

brief; but Appellee argues that because the legislature passed the Revised Laws (1905), Sec. 1, which declares, among other things, that the common law of the Territory of Hawaii is the common law of England * * * except as otherwise expressly * * * fixed by Hawaiian judicial precedent, that, therefore, the legislature had the *Kekula case* in mind, when it passed Revised Laws (1905), Section 2288, which was originally made the law of Hawaii by Session Laws, 1866.

The *Revised Laws* was passed as a whole by *Session Laws, 1905, Act 3*; and, as soon as, the interpretation put upon *Revised Laws (1905), Sec. 2288*, by the decision at bar was brought to the attention tf the legislature of 1907 it was amended to read:

"All children born out of wedlock, irrespective of the marriage of either parent to another, become legitimate on the marriage of the parents with each other and are entitled to the same rights as those born in wedlock."

Since, however, the decision in the Kekula case according the opinon at bar, seems to have been rendered because Sec. 2288 was *contra bonos mores*, that section as amended will be no more effective to make the children of an adulterous intercourse legitimate upon the marriage of their parents than it was before amendment, if the decision at bar is sustained.

For these reasons we ask that the judgment be reversed.

Respectfully submitted,

Annie Kealoha

Keoni Williams

T. M. HARRISON,
Attorney for Appellants.

FILED
MAY 25 1908
JAMES H. MCKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1907

No. 230

ANNIE KEALOHA AND KEONI WILLIAMS,
Appellants,

vs.

WILLIAM R. CASTLE,
Trustee.

Appeal from the Supreme Court of the Territory of Hawaii

BRIEF FOR APPELLEE

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INDEX.

Statement of the case..... 1

Argument—

I. Alleged decision of Mr. Justice Bickerton is not *res judicata* 11

II. The Kekula case is an Hawaiian Judicial precendent binding on the Court..... 16

III. The decision is good law..... 19

IV. Is a rule of property..... 21

CASES—CITED.

Andrews v. National F. & P. Works, 76 Fed. 166.. 15

Bethlehem v. Watertown, 51 Conn. 490..... 15

Biddle v. Burnham, 91 Me. 578..... 15

Buckley v. Perrine, 54 N. J. E. 285..... 13

Calderwood v. Peyser, 42 Cal. 110-155..... 12

Christian v. Railroad, 133 U. S. 233..... 13

Collins v. Lofftus, 10 Leigh 5, 10 13

Cope v. Cope, 137 U. S. 682..... 20

Estate of Brash, 15 Haw. 372..... 14

Furgeson v. Jones, 17 Ore. 204..... 13

Gilman v. Philadelphia, 3 Wall. 713..... 21

Glass v. Smith, 66 Tex. 548..... 13

Goodnow v. Litchfield, 63 Iowa 275..... 15

Gordon v. Green, 113 Mass. 259.....13-14
Grignon v. Astor, 2 Howard 343 21
Grimball v. Cruse, 70 Ala. 534..... 13
Hoosier Stone Co. v. Railway, 131 Ind. 575..... 15
Kake v. Horton, 2 Haw. 209..... 17
Kekula v. Pioeiwa, 4 Haw. 292..... 19
Lane v. Welds, 99 Fed. 286..... 15
Litchfield v. Goodnow, 123 U. S. 549..... 15
Long v. Holt, 18 Haw. 290..... 14
Lowndes v. Huntington, 153 U. S. 1..... 21
McArthur v. Scott, 113 U. S. 340..... 13
Mossman v. Government, 10 Haw. 421..... 16
Parker v. Moore, 59 N. H. 454..... 15
Pennoyer v. Neff, 95 U. S. 714..... 13
Price v. Schaeffer, 161 Pa. St. 530..... 13
Roller v. Ried, 87 Tex. 69..... 13
Sams v. Sams, 85 Ky. 396..... 20
Schooner Robert Lewers Co. v. Kekauoha, 114 Fed. 849-854 17
Session v. Romadke, 145 U. S. 29..... 19
Shipman v. Rollins, 98 N. Y. 311..... 15
Simon v. Ellison, 90 Va. 157, 17 S. E. 836..... 13
Smith v. Hamakua Mill Co., 13 Haw. 245..... 16
The Lottawanna, 21 Wall. 558..... 21
Walker v. Philadelphia, 195 Pa. St. 168..... 15
Whitcomb v. Hardy, 68 Minn. 265..... 15

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STATEMENT

The record is somewhat obscure. On pages 1 and 2, folios 1-3, of the transcript is a copy of the will of Joshua R. Williams, which it appears by stipulation (Tr. p. 6 fol. 12) was admitted to probate by the Supreme Court of the Hawaiian Islands July 30, 1879. His son John,

who survived him (Tr. p. 2 fol. 4), died in or before the year 1891 and some years after 1883 (Tr. p. 3 fol. 5); the respondent is the Trustee under the will of Joshua R. Williams and holds the estate under direction to pay the income in equal shares to certain children "and upon the decease of any of my said children his or her share is to be paid to his or her children, if any, by said trustee, until the decease of the survivor of my said wife and children, when my estate shall be divided." (Tr. p. 1 fol. 1).

JohnWilliams had one child, Othello, by his lawful wife, Kahinu, and, while living in lawful wedlock with her, John had two children by Kahalauaola, who was then unmarried, who are the appellants here: Annie, born in 1879; Keoni, born in 1883.

Some years after, Kahinu died, and John Williams "thereafter intermarried with said Kahalauaola and thereupon admitted that he was the father of the said two children above named." (Tr. p. 3 fol. 5).

In 1891 the respondent, being uncertain as to the propriety of paying over to the said children any portion of the income of the estate of Joshua R. Williams, applied to the Supreme Court in Probate for directions as to the standing of the children, and "he was instructed and authorized by the Honorable Richard F. Bickerton, one of the Justices of said Court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents." (Tr. p. 3 fol. 5).

Respondent continued to make payments until within a year or two, when payments were denied, on the ground that the appellants were not entitled to receive any portion of the income. (Tr. p. 3 fol.5).

The marriage of Annie, the arrival at majority of Keoni, and the fact that there is a considerable amount of income to be paid over, are alleged; and a prayer for an accounting added.

A demurrer was filed by the respondent for want of equity in the bill, and that the petitioners had no interest in the estate therein described such as would entitle them to the relief prayed for.

The question whether the demurrer was well taken was reserved by the Circuit Judge for the consideration of the Supreme Court of Hawaii (Tr. p. 7 fol. 14). The matter was argued before the Supreme Court of the Territory of Hawaii, and by an opinion filed October 16, 1905, the Circuit Judge was advised that the demurrer should be sustained, Justices Hartwell and Wilder holding that a decision rendered in the case of Kekuła and husband v. Pioeiwa and Paku, 4 Haw. 292 (1880), was a precedent decisive of the case, the court there holding that the original Act of 1866 (now Sec. 2288 Revised Laws), "All children born out of wedlock are hereby declared legitimate on the marriage of the parents to each other and are entitled to the same rights as those born in wedlock," was inapplicable to offspring of an adulterous intercourse. Justices Hartwell and Wilder further holding that the Hawaiian Court at that time

(1880) "had power to declare a statute unconstitutional which it deemed to be *contra bonus mores,*" and that the court in the case cited had held that "any other construction of this Act would be subversive of good morals and we cannot think that the legislature so intended it." (Tr. pp. 8 & 9, fol. 16 & 17).

Without deciding whether, if the question was presented *de novo,* any other view of the matter would be taken, as the decision laid down a rule affecting rights of property, and as the instruction by Mr. Justice Bickerton was without notice or issue concerning the legitimacy of the children, the court followed the decision cited. Chief Justice Frear concurred on the ground that, although he thought the decision in the Kekula case erroneous, it ought not to be overruled under all the circumstances. (Tr. pp. 8. 9 & 10 fol. 15 to 18).

The Circuit Judge then entered his decree sustaining the demurrer and dismissing the petition. (Tr. p. 10 fol. 19).

This decree was affirmed on error by the Supreme Court of Hawaii March 15, 1906, upon the opinion heretofore referred to (Tr. p. 14 fol. 26), and a judgment entered by the Supreme Court (Tr. p. 15 fol. 27), from which this appeal is taken.

In early times Hawaii comprised a number of kingdoms, united by Kamehameha the Great in one. A feudal system prevailed, the king was lord paramount, the chiefs mesne lords and the common man tenant paravail. The laws were mostly, if not all, customary;

enacted by the king, but usually after consultation with a council of high chiefs. These laws were oral until after the arrival of the missionaries in 1820. The king was not only the law-giver, but the judge and the executor of the law.

The first written law was one of June 2, 1825, in regard to the entry and clearance of vessels, the dessertion of seamen, and harbor and pilot dues at the port of Honolulu. But in the year before, Kaahumanu had published at Lahaina, orally, a law against murder, theft, fighting, desecration of the Sabbath, and compelling attendance at the schools.

The second written law in 1827 reitterated these oral laws, and forbade also fornication, the selling of rum, prostitution and gambling.

Other laws were from time to time enacted until the promulgation of the first constitution June 7, 1839, which, as it is incorporated in the constitution of 1840 as a Declaration of Rights, is known by that name; and this was followed by the constitution of 1840, which established a government with diverse functions, with chosen representatives, and a supreme court, at the head of which was the king.

The judicial system was not materially developed until the arrival of John Ricord, who was made attorney-general in 1845 and who drew the principal Acts of Kamehameha III, including that organizing the judiciary department. In his work he was aided by another young lawyer, W. L. Lee, who afterwards became the

first Chief Justice of the Supreme Court and founded the Hawaiian judicial system.

The constitution was revised and a new constitution promulgated June 14, 1852, providing for a supreme court. A new constitution was promulgated by Kamehameha V Aug. 20, 1864, another by Kalakaua July 7, 1887, and after the overthrow of the monarchy in 1893 a constitution was adopted in 1894, followed by annexation by the Newlands Resolution of July 7, 1898, and the Organic Act of April 30, 1900.

In the Constitution of 1840 it was provided that the decision of the Supreme Court "shall be final."

Fundamental Law of Hawaii, Thurston, p. 9.

In substance, in the other constitutions it is provided:

"The decisions of the Supreme Court, when made by a majority of the justices thereof, shall be final and conclusive upon all parties."

Constitution of 1852 Article 87, Thurston, p. 166.
Constitution of 1864, Article 66, Thurston, p. 178.
Constitution of 1887, Article 69, Thurston, p. 192.
Constitution of 1894, Article 86, Thurston, p. 234.

The civil Laws were first codified in the Code of 1859, and are now contained in the Revised Laws of 1905. In 1884 the existing Civil Laws were officially issued as the "Compiled Laws of the Hawaiian Kingdom," and in 1897 as the "Civil Laws;" but neither compilation was itself enacted into a law, although made officially.

By Section 4 of the Act to Organize the Judiciary Department of the Hawaiian Islands, Laws of 1847, p. 5, it was provided:

"SECTION IV. The judgments and decisions of said courts, whether of record or not, unless appealed from, shall be final and binding upon the parties, and upon the subject matter before them, and shall be, as to the causes so decided and unappealed from, the law of this kingdom, not to be disregarded, but to be fulfilled by the parties and enforced by mandate of the courts. Judgments and decisions passed and rendered by two thirds of the Judges of the Supreme Court, shall be the absolute law of this kingdom, as effectually binding in the controversy or question submitted to them, as if passed by the Legislative Council of Nobles and Representatives, and sanctioned by the King in his executive capacity. Said judgments and decisions of the Supreme Court, shall be binding and compulsory upon all inferior courts, in all matters, causes, and controversies, and the parties litigant, plaintiff, defendant, prosecutor, or prosecuted, may cite them for that purpose, and they shall be taken notice of by said courts as such, in the administration of justice. The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom. The principles sustained by said courts when sanctioned by the Supreme Court, shall become incorporated with the common law of the Hawaiian Islands, and shall form an essential ingredient in the civil code: Provided always, that the legislative Council of Nobles and Representatives, may by act sanctioned by His Majesty, and duly promulgated, correct, alter, or abrogate the principles of such abstract judgments and decisions, in analogous cases afterwards to arise before said courts, or any of them."

Civil Code, 1859, provides:

"SECTION 14. The Judges have equitable as well as legal jurisdiction, and in civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries."

"SECTION 823. The several courts may cite and adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as the same may be founded in justice, and not in conflict with the laws and customs of this kingdom."

"SECTION 816. Said department, and the several judges and other judicial offices thereof, shall, in all respects, be independent of both the executive and legislative departments. The King shall have no power to interfere with, alter, or overrule any judgment or decision of any judge, or other judicial officer; provided, however, that nothing herein contained shall be construed to prevent His Majesty from granting reprieves and pardons, after conviction, for all offenses, except in cases of impeachment."

The Newlands Resolution declares:

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain

in force until the Congress of the United States shall otherwise determine."

The Organic Act provides:

"SECTION 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

"SECTION 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed."

"SECTION 83. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature."

By Chapter 57, Section 5, of the laws of 1892 (now Section 1, Revised Laws of 1905).

"The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws."

This section is found in Civil Laws as Section 1109, and also as Section 1 of the Revised Laws of 1905, as follows:

"SECTION 1. APPLIES EXCEPT WHEN. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, PROVIDED, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory of Hawaii. (L. 1892, c. 57, s. 5; C. L. s. 1109; am. L. 1903, c. 32, s. 2)."

The statute in question was first enacted by the Act of May 24, 1866, is found in the Compiled Laws of 1884 (p 427), in the Civil Laws of 1897 (Sec. 1876) and in the Revised Laws of 1905 (Sec. 2288).

"SECTION 2288. Bastards; legitimazation. All children born out of wedlock, are hereby declared legitimate on the marriage of the parents with each other, and are entitled to the same rights as those born in wedlock."

Since the decision, by Act 71 of the Laws of 1907, this section has been amended so as to read as follows:

"Section 2288. All children born out of wedlock, irrespective of the marriage of either parent to another, become legitimate on the marriage of the parents with each other and are entitled to the same rights as those born in wedlock."

The questions arising in the case are: (1) Whether the rule of law laid down in the Kekula case is a Hawaiian judicial precedent, binding on that court; (2) whether it has become a rule of property, and therefore

should be followed; (3) whether the statute as re-enacted was adopted with the construction already given by the court; (4) whether in fact it was not the correct rule to adopt, and (5) whether the effect of this decision has been at all changed by the action of Mr. Justice Bickerton in 1891.

ARGUMENT.

I.

The alleged decision of Mr. Justice Bickerton is not res judicata.

The appellants contend that it was error to hold that the decision of Mr. Justice Bickerton that the income should be paid the appellants on the theory that they were legitimate did not make the question res judicata.

It is alleged in paragraph IV of the petition in this case (Tr. p. 3) that:

"That in the year 1891, the said respondent being uncertain as to the propriety of paying over to the said children, or to anyone in their behalf, their share or any portion of the income of the estate of said J. R. Williams, deceased, applied to the Supreme Court in Probate, said Court at that time having jurisdiction at Chambers in matters of probate, for instructions as to the standing of said children, and that he was instructed and authorized by the Honorable Richard F. Bickerton, one of the Justices of said Court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents, and that thereafter said respondent as trustee duly made such payments to said Kahalauaola, the mother of said children, in their behalf, until within a year or two past,

since which time respondent has utterly refused to make payments to the said children, or either of them, or to anyone in their behalf, claiming that they were not and are not now entitled to receive any portion of the income or to share in the principal of the said estate of J. R. Williams, deceased."

Referring to this point, the Supreme Court of Hawaii said (Tr. p. 10): "As to the instruction by Mr. Justice Bickerton, it does not appear that any notice was given of the proceedings or that there was any contest or issue made concerning the legitimacy of children."

We claim that the Supreme Court was right in regarding the instruction of Justice Bickerton as a nullity. That proceeding was merely informal and exparte.

The controversy was between Othello (the legitimate son of John) Williams on the one side, and the present appellants on the other. They were the real parties in interest. The trustee could not represent either side of the controversy; as a mere stakeholder he was required to stand impartial. The parties interested were not before the court, and it does not appear that they had notice of the proceeding. The court, therefore, acquired no jurisdiction over the only parties in interest. There was no case pending before Justice Bickerton in which any valid order or decree could be entered.

"A case is a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice; to the existence of such a case parties are necessary; also pleadings, and proceedings, trials, orders, judgments, etc., usually follow."

Calderwood v. Peyser, 42 Cal. 110-115.

"In every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all."

McArthur v. Scott, 113 U. S. 340;
Christian v. Railroad, 133 U. S. 233.

"At law, indeed, the trustee is the proper party defendant; but in equity no decree can be rendered affecting the rights of the cestui que trust, unless he is a party; for it is a fundamental principle of the court that all parties, however remotely concerned in interest, must be before it, or no decree can be made to bind them. This is particularly the case as to cestuis que trust, since the trustee is a mere nominal party, and the real beneficial interest is in the cestuis que trust."

Collins v. Lofftus, 10 Leigh 5, 10.
Simon v. Ellison, 90 Va. 157, 17 S. E. 836;
Gordon v. Green, 113 Mass. 259;
Story's Equity Pleadings, Sec. 207.

In an action in personam, jurisdiction over the person of a defendant is acquired by his voluntary appearance, or by the service upon him of such process as the law provides.

Pennoyer v. Neff, 95 U. S. 714;
Glass v. Smith, 66 Tex. 548;
Roller v. Ried, 87 Tex. 69;
Buckley v. Perrine, 54 N. J. E. 285;
Price v. Schaeffer, 161 Pa. St. 530;
Furgeson v. Jones, 17 Ore. 204.

In controversies between beneficiaries, the trustee is required to stand neutral.

Grimball v. Cruse, 70 Ala. 534;
Gordon v. Green, 113 Mass. 259.

In the proceeding before Mr. Justice Bickerton, the court not only did not acquire jurisdiction over the parties in interest, but it also lacked jurisdiction of the subject-matter.

The trustee applied for instructions to the Probate Court. But that court had no jurisdiction over trusts or trustees. Justice Bickerton, sitting as a probate judge, was without any authority to give the trustee any directions.

Estate of Brash, 15 Haw. 372;
Long v. Holt, 18 Haw. 290.

The jurisdiction in such matters is naturally in equity.

The local statute, which enumerates the subjects of equitable cognizance, specifies:

"Suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate."

Compiled Laws, (1884), p. 389;
Civil Laws (1897), Sec. 1498;
Revised Laws (1905), Sec. 1834.

Lack of jurisdiction either of the parties or the subject-matter will, of course, prevent the judgment having any binding force and render it valueless for any purpose of

estoppel. A judgment entered under such circumstances does not constitute res judicata.

"Although a judgment concludes all matters actually determined that were within the jurisdiction of the court, it does not conclude matters over which no jurisdiction existed."

1 Van Fleet's Former Adjudication, Sec. 12.

"The judgment or decree must conclude both parties or it will conclude neither. The estoppel must be mutual. No person can take advantage of a judgment or decree if he would not have been prejudiced by it if it had been otherwise."

24 A. & E. Enc. Law, 730;

Litchfield v. Goodnow, 123 U. S. 549;

Lane v. Welds, 99 Fed. 286;

Andrews v. National F. & P. Works, 76 Fed. 166;

Bethlehem v. Watertown, 51 Conn. 490;

Hoosier Stone Co. v. Railway, 131 Ind. 575;

Walker v. Philadelphia, 195 Pa. St. 168;

Goodnow v. Litchfield, 63 Iowa 275;

Biddle v. Burnham, 91 Me. 578;

Whitcomb v. Hardy, 68 Minn. 265;

Parker v. Moore, 59 N. H. 454.

"A party who was not a party to an action cannot, by accepting the result of the judgment therein, make such judgment res judicata in his favor, and preclude the parties to the action from objecting that the judgment was not binding on him."

24 A. & E. Enc. Law, 731;

Shipman v. Rollins, 98 N. Y. 311;

We submit that it is clear that these appellants would not have been concluded by Justice Bickerton's order if it had been against them. They cannot, therefore, set up that order as a bar in the present proceedings.

The appellants say in their brief (p. 4): "The record of those proceedings on file in the office of the clerk of the Supreme Court of Hawaii shows that the facts concerning the birth of the appellants out of wedlock while their father was married to Kahinu, and the subsequent marriage of their parents were fully before Mr. Justice Bickerton, by the testimony of Kahalauaola."

But it does not appear that the court's attention was then called to the case of Kekula v. Piociwa.

The proceeding before Justice Bickerton was not in rem. In Hawaii the jurisdiction in probate to decree heirships is confined to proceedings for the distribution of intestate estates and limited to the distribution of personal property.

Mossman v. Government, 10 Haw. 421;
Smith v. Hamakua Mill Co., 13 Haw. 245.

II.

The Kekula case is an "Hawaiian judicial precedent," conclusive in the decision of the case at bar.

By the Organic Act all rights of action remain effectual (Sec. 10), and the laws of Hawaii not inconsistent with the Constitution and Laws of the United States or the provisions of that act are continued in force (Sec. 6); as are the laws relative to the Judicial Department (Sec. 83).

Among these laws was the Act of 1892, Sec. 5 of which is Civil Laws, Sec. 1109, and now Sec. 1 of the Revised Laws of 1905, the Civil Laws being expressly included within the phrase "laws of Hawaii" (Organic Act, Sec. 1).

The effect of this legislation is to substitute, in place of the rule of decision drawn alike from the common law, the civil law and the laws and usages of other countries, the common law of England as ascertained by English and American decisions, except as otherwise fixed by Hawaiian judicial precedent or established by Hawaiian usage.

The Kekula case recognized a principle which became, "by judicial adoption, a valuable part of the common law of the kingdom."

Kake v. Horton, 2 Haw. 209.

"Such judicial modification of the common law the legislature of Hawaii expressly sanctioned and ratified by Section 1109 of Ballou's compilation of the laws of that country, which, as has been seen, was, in turn, sanctioned and ratified by section 1 of the act of Congress of April 30, 1900, above set out. There was therefore statutory authority for the right asserted, and sustained by the court below."

The Schooner Robert Lewers Co. v. Kekauoha, 114 Fed. 849-854.

The effect of the decision was to hold that the statute of 1866 was declaratory of the Roman or Civil Law as restored by the Scotch courts. Mr. Justice Judd, in his opinion, places it squarely upon that ground, citing Schouler as follows:

"The doctrine of the legitimation of offspring by the subsequent marriage of their parents is of Roman origin, introduced by Constantine, to put down that matrimonial concubinage which had become so universal in the empire, and the canonists based the law not on general views of expediency and justice, but upon a fiction, in order to reconcile the new law with established rules; for assuming that as a general rule, children are not legitimate unless born in lawful wedlock, they declare that *fiction' juris*, the parents were married when the child was born. But the Scotch Courts have placed the rule once more where its imperial founders left it, namely, on the grounds of general policy and justice. Legitimation is thought to be recommended by these considerations of equity and justice, that it tends to encourage what is at first irregular and injurious to society into the honorable relation of lawful matrimony; and that it prevents those unseemly disorders in families, which are produced where the elder born children of the same parents are left under the stain of bastardy, and the younger the status of legitimacy." *Schouler's Domestic Relations*, pp. 308, 309.

And after calling attention to the fact that the doctrine of the civil law had not found favor in England, he says that, taking either view on which this is based, viz., the fiction presuming that the parents were married, or that the law intends to encourage lawful matrimony, this cannot apply to an adulterous connection. And he calls attention, citing 2 Kent's Com., Section 210,

to the fact that in France, where the rule is adopted, the offspring of incestuous or adulterous intercourse are excepted.

Kekula and Husband v. Pioeiwa, 4 Haw. 292.

Language cannot be more clear of an intention to follow in the construction of the statute, not the common law, but the civil law, the Scotch law, the Code Napoleon.

The distinction was well known and is pointed out by Blackstone. (Blackstone, vol. 2, pp. 247-248).

Again, the decision in 4th of Haw. is binding for another reason. When the statute of 1892 was adopted, one of the laws which modified the common law was the statute of 1866, and it modified it as "fixed by Hawaiian judicial precedent" in the Kekula case, for the case covered by the statute of 1866 is "otherwise expressly provided by Hawaiian laws."

Dole v. Gear, 14 Haw. 554.

When re-enacted as a modification of the common law by the statute of 1892, it was with the construction put upon it by the Hawaiian court.

Session v. Romadke, 145 U. S. 29.

III.

The decision in the Kekula case was right and is good law.

"Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit,

do not apply to the fruits of an adulterous intercourse. *Sams v. Sams*, 85 Ky 396."

Cope v. Cope, 137 U. S. 682.

In the case cited, the case of *Brewer v. Blougher*, 14 Pet. 178, relied on by the appellant, is fully considered and shown to apply to a case where the Legislature has clearly determined otherwise the question of expediency and the moral tendency of a law.

Here, the Hawaiian court, in a decision long acquiesced in, has determined what the Legislature has judged to be expedient and what it has judged to be the moral tendency of the law, a matter peculiarly for that court.

It is unnecessary to cite decisions to the effect that the construction by the highest court of a sovereign state of its statute is conclusive upon this court. The Kekula case, when decided, was the decision of the highest court of a sovereign and absolutely independent state.

The question before the court was to discover the legislative intent. That intent was not to be judged solely from the moral tendency imputed by the common law of England. It was to be drawn from the moral tendency imputed by the common law of Hawaii, which drew, for the sources of its reasoning, as well from the civil law and the customary law of other nations as from the common law, and the conclusion reached by the Hawaiian court in the case at bar and in the Kekula case is in consonance with the moral tendency of the legislation of the world and construes the act as declaratory

of what Schouler says is the rule laid down by the imperial founders of the Roman law as restored by the Scotch courts.

IV.

The decision in the Kekula case is a rule of property which this court will not overturn.

It does not appear in this case, although it might appear, that titles have been acquired and property changed hands on the faith of the decision in question. It can be assumed by this court. Such title must be deemed inviolable, in virtue of the solemn judgment long relied on.

Grignon v. Astor, 2 How. 343.
The Lottawanna, 21 Wall. 558.

Nor should they be overruled, unless clearly erroneous.

Gilman v. Philadelphia, 3 Wall. 713.

This court should follow that case as a settled rule of the Kingdom of Hawaii as to property conclusive on this court.

Lowndes v. Huntington, 153 U. S. 1.

On reason, on authority, in the interests of the stability of title, we ask that this judgment be affirmed.

Respectfully submitted,

A. G. M. ROBERTSON,
DAVID L. WITHINGTON,
For WILLIAM R. CASTLE,
Trustee.

KEALOHA *v.* CASTLE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 230. Submitted April 28, 1908.—Decided May 18, 1908.

The courts of Hawaii having prior to the annexation construed the statute of May 24, 1866, legitimatizing children born out of wedlock by the subsequent marriage of the parents as not applicable to the offspring of adulterous intercourse, and the organizing act of the Hawaii territory having continued the laws of Hawaii not inconsistent with the Constitution or laws of the United States, this court adopts the construction of the Hawaiian statute given by the courts of that country.

While in different jurisdictions statutes legitimatizing children born out of wedlock by the subsequent marriage of the parents have been differently construed as to the application thereof to the offspring of adulterous intercourse, in construing such a statute of a Territory this court will lean towards the interpretation of the local court.

The construction of a statute affixed thereto for many years before territory is acquired by the United States should be considered as written into the law itself.

An *ex parte* and uncontested proceeding construing a statute and directing payments in accordance with such construction cannot be pleaded as *res judicata* in a subsequent contested proceeding.
17 Hawaii, 45, affirmed.

By the last will of Joshua R. Williams, duly admitted to probate by the proper court of the Hawaiian Islands on July 30, 1879, William R. Castle, the appellee, was appointed trustee to collect and manage the estate of said Williams. After the decease of Williams, Castle duly qualified and entered upon the performance of the trust. He was charged with the duty of paying the income of the estate to named beneficiaries during life, and on the decease of any of such beneficiaries the share was to be paid to the children, and the distribution of the principal of the estate was postponed to a remote period. One of the named beneficiaries was a son, John. He married, and his wife bore him a son, Othello. While John was living in lawful wedlock another woman bore him two children, Annie, born in 1879, and a son, Keoni, born in 1883. Some years subsequent to 1883, his first wife having died, John married the mother of his two illegitimate children. John died about 1891, leaving his second wife surviving him, as also the child Othello by the first wife and the two illegitimate children referred to. One of these, Annie, married one Kealoha, and in 1905, after she and her brother Keoni had reached their majority, they filed in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, a bill against Castle for an accounting, in which substantially the facts above stated were set forth. It was also averred that although, on an application by the trustee, he had in 1891 been instructed by a justice of the court to make payment to the said Annie and Keoni of their shares, on the theory that they had been legitimated by the marriage of their parents, the trustee had ceased to make said payments and denied that they were entitled to receive any portion of the income or to share in the principal of the estate. It was prayed that the trustee might be ordered to render an account and be compelled to make payment of the

portion of the income to which it might appear the petitioners were entitled. A demurrer was filed to the bill, and the question whether the demurrer should be sustained was reserved to the Supreme Court of the Territory, it being stated in the certificate that the following question of law was raised by the demurrer, upon which the court was in doubt, viz:

"Whether or not said demurrer should be sustained or overruled, which involves the construction of section 2288, Revised Laws of Hawaii, and its application to the facts as alleged in the bill herein; that is to say, were the petitioners made legitimate by the marriage of their parents subsequent to their birth and thereby rendered capable of inheriting from their father, J. R. Williams, deceased."

The Supreme Court held that the demurrer ought to be sustained, and upon remittitur the Circuit Court entered a decree sustaining the demurrer and dismissing the petition with costs. This decree having been affirmed by the Supreme Court of the Territory, the case was brought here by appeal. 17 Hawaii, 45.

Annie Kealoha and *Keoni Williams*, appellants, for themselves.

Mr. A. G. M. Robertson and *Mr. David L. Withington* for appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The assignments of error assailing the action of the Supreme Court of the Territory propound two questions for our consideration:

1. Was it error to hold that, as the appellants were the issue of an adulterous relation between their father and mother at a time when the father was the lawful husband of another, they were not made legitimate by the marriage of their father

and mother after the death of their father's first lawful wife, and by force of the statutes of Hawaii?

2. Was it error to hold that the instruction given to the appellee in 1891, to make payment to the appellants of a portion of the income of the trust property, the title to which is in dispute, in this suit, on the theory that they had become legitimate by the subsequent intermarriage of their parents, did not make the matters in dispute *res judicata* during the entire administration of the said trust property?

As to the first question. The law in force at the time of the death of the testator Williams, in 1879, which, on the marriage of the parents, legitimated children born out of lawful wedlock was passed on May 24, 1866 by the legislative assembly of the Hawaiian Islands, and appears as the first statute in the session laws for 1866–67. It is also contained in Comp. Laws, 1884, p. 427, and Civil Laws of 1897, § 1876. The statute was carried into the Revised Laws of 1905 as § 2288, in similar phraseology, and reads as follows:

"All children born out of wedlock are hereby declared legitimate on the marriage of the parents with each other, and are entitled to the same rights as those born in wedlock."

In the year 1880, in *Kekula* v. *Pioeiwa*, 4 Hawaii, 292, the proper interpretation of the act of 1866 was directly involved. The action below was in ejectment. Plaintiff was the issue of a woman by a man not her husband, he being then married to another. The wife having died, the father married the mother of the plaintiff. The right of the plaintiff to recover depended upon the fact of his constructive legitimacy. It was held, however, that the act of 1866 did not apply to the case of an adulterous intercourse, and that the offspring of such intercourse could not inherit from the father. While it was observed in the opinion that to enforce a contrary doctrine would be opposed to good morals, it is plain that the conclusion reached was that the statute was adopted by the legislative department of the Hawaiian government with the intention that it should have the restrictive effect given to it by the court. In other

words, it was decided that the statute should not be broadly construed, as was claimed on behalf of the plaintiff. The statute was not afterwards modified, the decision in the *Kekula case* has never been disapproved or doubted by the court which rendered it, it has undoubtedly become a rule of property, and was followed in the instant case. On the coming of the Hawaiian Islands under the sovereignty of the United States this statute was in force, with the construction given to it by the highest court of the country, and its continued enforcement was in effect ordained by the organic act, which, in § 6, provided, "That the laws of Hawaii, not inconsistent with the Constitution or laws of the United States or the provisions of this act, shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

In Kentucky, in 1887 (*Sams* v. *Sams*, 85 Kentucky, 396, where the facts were somewhat similar to those in the instant case), it was held:

"Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse."

In other jurisdictions, however, statutes of similar character have been given a broad construction, and where exceptions have not been stated none have been implied. *Brewer* v. *Blougher*, 14 Pet. 178; *Hawbecker* v. *Hawbecker*, 43 Maryland, 516; *Ives* v. *McNicoll*, 59 Ohio St. 402. And see *Carroll* v. *Carroll*, 20 Texas, 732; *Munson* v. *Palmer*, 8 Allen, 551; *Adams* v. *Adams*, 36 Georgia, 236; *State* v. *Lavin*, 80 Iowa, 556. But, under the circumstances to which we have hitherto called attention, we do not think we may enter into a consideration of these conflicting decisions. Even in the case of a law adopted by an organized Territory of the United States at a time when it was subject to the control of Congress, the rule is that we

will lean towards the interpretation of a local statute adopted by the local court, and that where a statute of a Territory has been in existence for a considerable time, and been construed by the highest court of the Territory, even apart from its re-enactment, weight attaches to the construction given by the local court. *Copper Queen Mining Co.* v. *Arizona Territory*, 206 U. S. 474. The case at bar, however, more cogently calls upon us not to disregard the construction given to the statute by the highest court of Hawaii. Here the law in question was passed while Hawaii was an independent government, and its meaning was declared by the court of last resort of that government, and, as we have said, that law as thus construed was given recognition by the organic act. The subject with which the law deals, the rights which may have come into existence during the more than forty years in which the statute has been in force, admonish us that we may not overthrow the meaning given by the court of last resort of Hawaii, and which has prevailed for so many years. Indeed, as the construction affixed to the statute many years before the islands were acquired was final, in effect that construction had entered into the statute at the time of acquisition and must by us be considered as if written in the law.

As to the question of res judicata. It was averred in the petition in the Circuit Court as follows:

"IV. That in the year 1891 the said respondent, being uncertain as to the propriety of paying over to the said children, or to any one in their behalf, their share or any portion of the income of the estate of said J. R. Williams, deceased, applied to the Supreme Court in probate, said court at that time having jurisdiction at chambers in matters of probate, for instructions as to the standing of said children, and that he was instructed and authorized by the Honorable Richard F. Bickerton, one of the justices of said court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents, and that thereafter said respondent, as trustee, duly made such pay-

ments to said Kahalauaola, the mother of said children, in their behalf, until within a year or two past, since which time respondent has utterly refused to make payments to the said children, or either of them, or to any one in their behalf, claiming that they were not, and are not now, entitled to receive any portion of the income, or to share in the principal of the said estate of J. R. Williams, deceased."

These averments cannot bear any other construction than that the application referred to was an *ex parte* proceeding. The Circuit Court of the Territory, we think, correctly disposed of the claim of *res judicata* by the following ruling:

"As to the instruction by Mr. Justice Bickerton, it does not appear that any notice was given of the proceedings, or that there was any contest or issue made concerning the legitimacy of children."

Affirmed.